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No. ——

IN THE
Supreme Court of the United States

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,
Petitioner,
v.
DAVINE ALEXANDER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether—on either of the following legal theories—an international union that is not "involved" in administering an affiliated local union's employment referral system, or in directing the local's administration of the system, is liable under 42 U.S.C. § 1981/Title VII of the Civil Rights Act of 1964 for the local's discriminatory employment referral practices by reason of the international's "neglect" to "investigate" and to "remedy" allegations of the local's discrimination:

1. Section 1981/Title VII impose an "affirmative duty" on international unions to investigate and to remedy allegations of affiliated local union discriminatory employment practices, and the neglect to conduct such an investigation and to effectuate such a remedy constitutes a breach of that "affirmative duty";

2. Section 1981/Title VII agency law principles provide that an international union's "acquiescence" in an affiliated local union's discriminatory employment practices makes the international vicariously liable for the local's discrimination, and an international's neglect to investigate and to remedy allegations of a local's discrimination constitutes "acquiescence."

PARTIES TO THE PROCEEDING

In addition to the Laborers' International Union of North America (a defendant in this case and the petitioner herein), the parties to this proceeding are:

(a) The plaintiffs in the case (and the respondents herein):

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Arthur Bryant
James D. Carson
Craig Clinton
Lee N. Coffee, Sr.
Ronald Colvin
Arthur L. Cook
Samuel D. Cook
Willie A. Edge
Alfred Edwards
Leon Edwards, Sr.
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Daniel O. Enoch
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Edward R. Gant
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Lamont A. Jackson
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Edward Turner II
Donald Waytes
Damon L. Wilburn
Dolores J. Williams
Willie Wright

(b) Local 496, Laborers' International Union of North America (a defendant in the case).

(c) Floyd B. Conrad (a defendant in the case).

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Respondents.

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PETITION FOR A WRIT OF CERTIORARI

The Laborers' International Union of North America, AFL-CIO, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment and decision in *Alexander v. Local 496, Laborers' International Union of North America, et al.*, 6th Cir. Nos. 96-3806/3823/3854/3857/3858 (April 30, 1999).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 177 F.3d 394, and is reproduced as Appendix A in the separately bound appendix to this *certiorari* petition. Pet. App. 1a-65a. The liability opinion of the United States District Court for the Northern District of Ohio is reported at 778 F. Supp. 1401 and is reproduced as Appen-

dix B hereto. Pet. App. 66a-108a. The order of the Court of Appeals denying rehearing and rehearing *en banc* is unreported, and is reproduced as Appendix C hereto. Pet. App. 109a-110a.

JURISDICTION

The Sixth Circuit issued its decision and judgment on April 30, 1999. The Court of Appeals issued its order denying a timely petition for rehearing and rehearing *en banc* on June 30, 1999. Through an order by Justice Stevens, petitioner was granted an extension of time through and including October 28, 1999 to file the instant *certiorari* petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

Title VII of the Civil Rights Act of 1964 defines the term labor organization as "a labor organization engaged in an industry affecting commerce, and any agent of such an organization," 42 U.S.C. § 2000e(d), and provides, in pertinent part, that "[i]t shall be an unlawful employment practice for a labor organization . . . to classify or fail or refuse to refer for employment any individual . . . because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(c)(2).

STATEMENT OF THE CASE

A. Factual Background

This 42 U.S.C. § 1981/Title VII of the Civil Rights Act of 1964 class action concerns employment on the Perry Nuclear Power Plant, Lake County, Ohio ("Perry") project. Plaintiffs in the District Court and respondents here are Davine Alexander *et al.*, and defendants in the District Court are the petitioner Laborers' International Union of North America, AFL-CIO ("LIUNA" or "International Union"), Local Union 496—one of 621 local unions affiliated with LIUNA—and Local 496's chief officer, Floyd Conrad.

As is true of each of the LIUNA affiliated local unions, Local 496 is a legally-separate entity which elects its own officers, maintains its own treasury, files its own labor organization reports required by the Labor Management Reporting and Disclosure Act with the Department of Labor, *see* 29 U.S.C. § 431, and conducts its own day-to-day operations. Individual workers become members of local unions affiliated with LIUNA and of LIUNA itself by joining a LIUNA local union in the area where the individual is employed. Members thereafter pay dues to their LIUNA local union to maintain their membership in good standing. The LIUNA local union, in turn, pays from these membership dues a monthly "per capita tax" to the International Union based on the number of members in good standing in the local.

The Perry Nuclear Plant project proceeded in two phases: a construction phase from 1973-1985 and an ongoing maintenance phase thereafter. The Perry construction was effectuated through a "PLA"—a project labor agreement between the plant owner, its contractors and a set of local unions representing construction workers—to which Local 496 was a signatory as one of two

local unions in the Lake County area that represents laborers. With regard to hiring the PLA provided:

> Contractors . . . shall . . . utilize the . . . referral systems operated by the Local Unions in accordance with the provisions of applicable Federal and State laws.
>
> The selection of applicants . . . shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect of union membership, policies, or requirements. [Pet. App. 36a n.3 (Batchelder, J., dissenting).]

LIUNA was *not* a party to the PLA. And, LIUNA had *no* role in administering the Local 496 exclusive employment referral system provided for therein. Pet. App. 5a; *id.* at 58a, 60a-62a (Batchelder, J., dissenting).

The Local 496 Constitution—which follows LIUNA's model constitution for affiliated local unions—contains a "working-at-the-calling" rule under which prior employment as a laborer in Lake County is a condition for union membership. The PLA—by obligating the Local to make referrals to Perry on a nondiscriminatory basis and without regard to union membership—effected a "waiver" of that rule with regard to such referrals. Pet. App. 4a; *id.* at 36a (Batchelder, J., dissenting).[1]

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[1] Although both the majority opinion and the dissent below use the term "waiver" to describe the effect that the PLA had on the "working-at-the-calling" rule, it would be more precise to say that the PLA made express what is true in all events—that the "working-at-the-calling" rule is a rule of limited scope that has no application to and no operative role with regard to local union exclusive referral systems or to a laborer's eligibility for a referral. The PLA made this express by its provision precluding Local 496 *from taking*

Each plaintiff is an African-American and a non-member of Local 496 who attempted unsuccessfully to obtain a referral through the Local for a Perry construction phase laborer's job. In 1984-85, plaintiffs filed a series of charges against Local 496 with the Equal Employment Opportunity Commission ("EEOC") alleging that the Local had violated Title VII by making Perry referrals on a racially discriminatory basis. LIUNA was not named as a respondent in these EEOC charges, but was provided copies thereof. Pet. App. 6a; *id.* at 34a (Batchelder, J., dissenting).

At the end of the Perry project's construction phase and in a transition to its ongoing maintenance phase, the PLA was replaced by a set of national maintenance agreements between the national and international unions representing construction/maintenance workers, the plant owner and its maintenance contractors. The LIUNA Maintenance Agreement incorporated the hiring provision of the predecessor PLA by providing that the maintenance contractors would hire "in accordance with the hiring procedure existing in the territory." Pet. App. 58a (Batchelder, J., dissenting). Under the Maintenance Agreement—as under the PLA—Local 496 administered its exclusive Perry referral system on its own and "[n]o LIUNA representatives or agents were involved." Pet. App. 5a.

B. The District Court Decision

In December 1984, plaintiffs sued Local 496 and its chief officer, Floyd Conrad, alleging that the Local and Conrad had discriminated on the basis of race in administering the Local's referral system. Over four years later, in September 1989, plaintiffs filed charges against

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membership status into account in referring laborers for work on the Perry project.

LIUNA with the EEOC, "alleging that LIUNA had intentionally neglected to investigate their charges of discrimination against the other defendants." Pet. App. 7a; *see also id.* at 34 (Batchelder, J., disenting). And, in January 1990, plaintiffs sought and were given leave to add LIUNA as a defendant herein, over the International Union's objection, *inter alia*, that any action against LIUNA was time-barred. Pet. App. 7a.

The District Court found that Local 496 and Conrad had, in violation of both § 1981 and Title VII, discriminated on the basis of race in administering the Local 496 referral system and that the Local and Conrad thus were liable in damages for plaintiffs' loss of Perry employment opportunities.

In addition, the District Court found LIUNA liable together with Local 496 and Conrad for the employment referral discrimination against the plaintiff class, "under two different legal theories." Pet. App. 104a. The District Court's first liability theory was that Local 496 "was acting as agent of the International Union" when the Local engaged in the discriminatory practices found, thus rendering the International Union *vicariously* liable for those practices. Pet. App. 104a. And, the District Court's second liability theory was that the International Union had "violated an affirmative duty under Title VII and § 1981 to oppose [the] discriminatory practices of Local 496," thus rendering the International Union *directly* liable for those practices. Pet. App. 104a.

The District Court's ruling that LIUNA is liable under these two legal theories was grounded on the following proposition: that throughout the relevant period LIUNA and Local 496 were affiliated labor organizations; that, for part of that period, LIUNA was a party to the Maintenance Agreement which provided for an exclusive re-

ferral system; *and* that LIUNA did not—after notice of the plaintiffs' claim that Local 496 and Conrad had administered the Local's referral system in a discriminatory manner—intervene to correct and to prevent Local 496's discrimination in its administration of its referral system. Pet. App. 105a-106a. That proposition supported the LIUNA *vicarious* liability, according to the District Court, because the International Union's inaction showed International Union "acquiesc[ence]" to Local 496's discriminatory practices. Pet. App. 105a. And, that proposition supported the LIUNA *direct* liability, according to the District Court, because the International Union's failure to intervene to correct and prevent Local 496's discriminatory practices constituted a breach of its "affirmative duty to oppose the discriminatory practices of Local 496." Pet. App. 105a.[2]

C. The Sixth Circuit Decision

The District Court's judgment against Local 496 and Conrad was affirmed by the Sixth Circuit panel below—Circuit Judges Batchelder and Cole and Senior Circuit Judge Keith—albeit in two separate opinions, one by Judge Cole joined by Judge Keith and one by Judge Batchelder. The judgment against LIUNA likewise was affirmed, but this time with Judge Batchelder in dissent. Pet. App. 22a-25a; *id.* at 57a-65a (Batchelder, J., dissenting).

The panel majority affirmed the District Court's ruling "that LIUNA is liable *both* vicariously and directly."

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[2] The amount of the damages assessed against Local 496 and LIUNA is—by the terms of a partial settlement agreement subsequently entered into in the District Court—dependent on the outcome of appellate proceedings. Pet. App. 7a-8a. "The parties also [have] agreed to a system by which Local 496 w[ill] give plaintiffs preference in employment referrals." Pet. App. 8a.

Pet. App. 23a (emphasis added). Following the District Court's lead, the panel majority predicated the imposition of liability on both legal theories on LIUNA's "neglect[] to remedy the alleged discrimination when it learned of the plaintiffs' claims." Pet. App. 22a. As the panel majority put it in concluding its discussion on the International Union's liability, "LIUNA was aware and on notice of the charges of discrimination filed against Local 496, as Floyd Conrad and the EEOC both informed LIUNA personnel of such developments. Thus the international cannot feign ignorance, and cannot be excused for breaching its duty to end Local 496's discrimination." Pet. App. 24a.[3]

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[3] The District Court's vicarious liability rationale is the very model of concise lucidity: "Because the Court finds that the International Union was aware of the discriminatory actions of Local 496 and Floyd Conrad both before and after March 1985 regarding refusing to make referrals to class members or permitting them to become union members and further finds that the International Union acquiesced in those actions, the Court finds for class members in their claims against the International Union." Pet. App. 105a.

The panel majority's rationale is not. We summarize it as we do in text by reason of the following. The panel majority affirmed the District Court's vicarious liability findings and conclusions and the panel majority's decision sets out its basis for that affirmance. In so doing the panel majority concludes its vicarious liability discussion by paraphrasing the District Court's rationale just quoted. And, as a matter of settled law and of the facts as stated by the panel majority, the intermediate points made in the majority opinion —that the 1985 Maintenance Agreement provided for an exclusive referral system and that the model local union constitution prescribed by LIUNA contains a "working-at-the-calling" rule—taken alone or in conjunction afford no basis for holding the International Union vicariously liable. *See infra* pp. 22-24. It follows, we believe, that the crux of the panel majority's vicarious liability ruling—like that of the District Court's ruling—is LIUNA's "neglect to remedy" Local 496's alleged discriminatory employment practices.

Judge Batchelder, in her dissent, found no basis for imposing liability upon LIUNA on *either* a vicarious liability theory *or* on a direct liability theory.

As to the vicarious liability theory, Judge Batchelder concluded that the District Court's findings, and the underlying record evidence, "reflect nothing more than mere 'acquiescence' " by the International Union, Pet. App. 61a, and that "[c]ontrary to the statements of the district court, mere 'acquiescence' is not enough" to support the imposition of vicarious liability under the applicable § 1981 and Title VII precedents. Pet. App. 60a.

As to the direct liability theory, Judge Batchelder began by noting that in *General Bldg. Contractors v. United Eng'rs & Constr.*, 458 U.S. 375 (1982), this Court had squarely ruled that § 1981 does not create any third person affirmative duty to prevent discrimination by others, and then concluded that Title VII likewise creates no such affirmative duty—citing, *inter alia*, Justice Powell's concurring and dissenting opinion (joined by Justices O'Connor and Scalia) in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 687-89 (1987). Pet. App. 63a-65a & n.18.[4]

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision in this case—which is contrary to decisions of this Court and of other Courts of Appeals—reworks the 42 U.S.C. § 1981/Title VII of

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[4] The panel majority also affirmed the District Court's rejection of LIUNA's statute of limitations defense. *See* Pet. App. 18-22. Because Judge Batchelder would have found non-liability on other grounds, she did not reach that issue in her dissent. Petitioner does *not* seek review of that statute-of-limitations ruling here. Although we believe that ruling to have been in error, we recognize that the error was largely in the misapplication of well-established law to the facts and that such errors do not provide a proper basis for review on *certiorari*.

the Civil Rights Act of 1964 scheme of prohibitions and liabilities in a fundamental regard and with profound consequences.

These anti-discrimination laws, on their face and as construed by this Court, (i) prohibit employers and unions from engaging in discriminatory practices in making employment decisions and in taking employment actions; and (ii) impose liability on employers/unions that do engage in such discriminatory employment practices.

On the decision below, however, § 1981/Title VII go well beyond imposing first person duties and providing for first person liabilities for breaches of those duties. According to the Court of Appeals, § 1981/Title VII enact as well *a third person duty and a corresponding third person liability*—a third person duty to intervene to correct and prevent first person discriminatory employment practices and a third person liability for the first person discrimination that the third person did not correct and prevent.

The Court of Appeals' "direct [LIUNA] liability" ruling here—that LIUNA "breach[ed] its duty to end [an affiliated local union's] discrimination" by "neglecting to remedy [that] alleged discrimination when it learned of the plaintiff's claims"—adds to the local union's duty not to engage in discriminatory employment practices stated in § 1981/Title VII, an affirmative international union duty to intervene so as to correct and to prevent an affiliated local union's discriminatory employment practices nowhere stated in § 1981/Title VII.

And, in both legal and practical terms the Court of Appeals' "vicarious liability" ruling—predicated on LIUNA's "neglect to remedy [Local 496's] alleged discrimination when it learned of the plaintiffs' claims" that the Local

was engaging in discriminatory employment practices—is to the same effect as its "direct liability" ruling. On *both* liability theories the determinant of an international union's § 1981/Title VII liability is the international's failure to act to correct and to prevent a local union's discriminatory employment practices—*not* any international union action constituting a discriminatory employment practice.

The Court of Appeals' "affirmative duty" theory has no root in the employer/union duties stated in § 1981/Title VII—as far reaching as those are. Nor, so far as we are aware, is there any root for any such "affirmative duty" theory in any of the array of federal employment and anti-discrimination laws. And, the Court of Appeals' "neglect to remedy" vicarious liability theory is equally foreign to the federal common law of agency as stated by this Court in *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925), and its progeny.

The Court of Appeals' rulings, moreover, do not spend themselves in the expansion of § 1981's/Title VII's prohibitions—those rulings have the most far-reaching effect on § 1981/Title VII liabilities. All but a handful of the thousands of local unions covered by § 1981/Title VII are separate legal persons affiliated with national and international unions that are, in their turn, separate legal persons. By the same token, thousands of the corporations covered by § 1981/Title VII are subsidiaries of other corporations and thousands of the employer associations covered by § 1981/Title VII are affiliated with national employer associations.

Under the Court of Appeals' rulings here, any local union discriminatory action that an international union with "notice" fails to intervene to correct and to prevent generates both a local union liability and an international union liability—and not a local union liability alone.

And, while the Court of Appeals did not opine on the point, there is nothing in § 1981/Title VII or in the law of agency that could possibly justify a different result in the subsidiary corporation-parent corporation context or in the affiliated employer association context.

In the run of cases, then, § 1981/Title VII litigation would no longer be focused on a union's/employer's allegedly discriminatory employment practices, it would be about that *and* about the nature of the notice to a related union/employer and about the nature and quality of that third person defendant's intervention to prevent the first person defendant's alleged discriminatory practices.

Given all this, the Court of Appeals' "affirmative duty" direct liability ruling plainly raises an anti-discrimination law question of the first magnitude. And, it is equally plain that this question is one that calls for this Court's review. The Court—in recognition of the importance of the "affirmative duty" theory to the proper development of the anti-discrimination law—has twice taken cases raising cognate "affirmative duty" questions. *General Bldg. Contractors v. United Eng'rs & Constr.*, 458 U.S. 375 (1982); *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). But in the event, neither *General Builders* nor *Goodman* provide a complete and definitive answer to the "§ 1981/Title VII affirmative duty" question presented here.

This question therefore remains an open one in this Court and a question that throws a large shadow of uncertainty over § 1981/Title VII law and over the litigation of § 1981/Title VII cases. That is so even though both the Court's *General Builder's* opinion and Justice Powell's *Goodman* opinion cut deeply—and, we believe, decisively—against the Court of Appeals' "affirmative duty" theory. And, that is so even though this Court and the Courts of Appeals have uniformly rejected attempts to

interject "affirmative duty" concepts into the federal labor relations statutes.

For precisely the same reasons, the Court of Appeals' "neglect to remedy" vicarious liability ruling raises a § 1981/Title VII agency law question of equal moment. It is particularly to the point that this ruling cannot be squared with the federal common law agency principles this Court has stated in its *Coronado Coal* line of precedent and that the Court of Appeals' decision in this regard is in conflict with every other Court of Appeals' § 1981/Title VII vicarious liability decision.

It is equally to the point that in light of their brigaded nature complete and considered review of the Court of Appeals' "affirmative duty" direct liability ruling all but requires simultaneous review of its "neglect to remedy" vicarious liability ruling. While the former is stated in substantive law terms and the latter in agency law terms both rest on the proposition that there is a legal duty on an international union with "notice" to intervene in the affairs of an affiliated local union to correct and to prevent the local union's alleged discriminatory employment practices and an attendant international union liability for the local union's discriminatory practices. Thus, both rulings rest on a single major premise and are so closely intertwined in the development of that premise as to be variations on a single theme. For all legal intents and purposes these two rulings raise a single question that calls for a single answer.

I. THE COURT OF APPEALS' DIRECT LIABILITY RULING

(a) The Court of Appeals' direct liability ruling here cannot be squared with this Court's *General Builders* decision or with Justice Powell's *Goodman* opinion (joined by Justices O'Connor and Scalia).

In *General Builders*, the lower courts found a group of employers and their trade associations liable under § 1981 for employment referral discrimination by a union with whom the employers/associations maintained a collective bargaining relationship. The lower courts there proceeded on the theory that the employers/associations had breached a "nondelegable duty . . . to see that discrimination does not take place in the selection of [their] workforce." 458 U.S. at 395. This Court rejected that theory:

> [I]n this litigation the question is not whether the employers and associations are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is *what* duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. *It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them.* [458 U.S. at 396 (first emphasis in original; second emphasis added).]

It is, we submit, equally true that Title VII, as its language and legislative history attest, prohibits unions (and employers) from "depriving black workers of the [equal employment] rights enumerated in the statute" and that Title VII does so without "mak[ing unions (or employers)] guarantors of the workers' rights as against

third parties who would infringe them." Indeed, Justice Powell's *Goodman* opinion (joined by Justices O'Connor and Scalia) comes to that conclusion.

In *Goodman*, the union *certiorari* petition rested on the "conten[tion] that the judgment against them rests on the erroneous legal premise that Title VII and § 1981 are violated if a union passively sits by and does not affirmatively oppose the employer's racially discriminatory employment practices." 482 U.S. at 665. The *Goodman* Court's opinion does not reach that contention on the ground that the true basis of the lower court's judgment there was that "the Unions had indeed discriminated on the basis of race by the way in which they represented the workers" in administering the contract grievance system and that this maladministration of the grievance system does constitute a violation of Title VII § 703(c)(1). *Id.* at 666-67.

At the same time Justice Powell, after noting his disagreement with that reading of the lower courts' decisions and the record, went on to "consider whether the judgment can be affirmed on the ground that Title VII imposes an affirmative duty on unions to combat discrimination by the employer." 482 U.S. at 687. Justice Powell answered that question "no."

Justice Powell began by showing that Title VII § 703(c)'s language "does not suggest that the union has a duty to take affirmative steps to remedy employer discrimination." 482 U.S. at 687. And, Justice Powell added that reading such an affirmative duty into Title VII would "disrupt the basic policies of the labor laws" which, *inter alia*, rest on the premise that unions, "[l]ike other representative entities . . . must balance the competing claims of its constituents . . . [and] make difficult choices among goals such as eliminating racial discrimination in the

workplace, removing health and safety hazards, providing better insurance and pension benefits, and increasing wages." *Id.* 688-89.

Justice Powell's reasoning exposes the fatal flaws in the Court of Appeals' "affirmative Title VII duty" ruling here.

First, although "[t]he starting point for analysis of this statutory question is, as always, the language of the statute itself," *Goodman*, 482 U.S. at 687 (Powell, J.), the panel majority did not even purport to cite Title VII language that would support the imposition on international unions of an "affirmative duty" to remedy alleged discrimination by their affiliated local unions. This was no mere oversight because Title VII contains no such language. By its plain terms, Title VII § 703(c) imposes liability on unions that engage in certain enumerated "unlawful employment practices," and nowhere in that enumeration does there appear the failure to police and remedy discrimination by affiliated unions or other third parties. *Cf. Goodman*, 482 U.S. at 687-88 (Powell, J.).

Second, "[i]n the absence of a clear statement of legislative intent, th[is] Court has been reluctant to read Title VII to disrupt the basic policies of the labor laws." *Id.* at 688. As the trusteeship provisions of the Labor-Management Relations Act reflect, one of those basic policies is the preservation of local union autonomy. *See* 29 U.S.C. §§ 461-466; *see also* Pet. App. 64a n.18 (Batchelder, J., dissenting). That policy unquestionably would be disrupted if Title VII were to be given the construction adopted by the panel majority. *Goodman*, 482 U.S. at 688-89 (Powell, J.).[5]

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[5] In this connection, it is notable that the court below gave no consideration whatsoever to the means by which international unions are to fulfill their affirmative § 1981/Title VII duty to "remedy" alleged discrimination by affiliated local unions. If a local union did

Third, in the absence of a statutory-language predicate for the imposition of an "affirmative duty" on international unions to remedy alleged discrimination by their local union affiliates, the panel majority resorted to the policy argument that such an imposition is necessary to vindicate Title VII's broad remedial purposes, inasmuch as local unions would, in the majority's view, have a "question-[able] . . . incentive . . . to comply with anti-discrimination statutes when they face no threat of sanction, or even investigation, by their parent union." Pet. App. 24a n.8.

To begin with, that remedial concern is wholly illusory, because local unions are themselves subject to "direct" Title VII liability if they engage in discrimination violative of that statute, as the instant case itself amply demonstrates. *Cf. Goodman*, 482 U.S. at 689 (the failure to recognize an affirmative duty on the part of a labor union to remedy employer discrimination would not leave the employee "without a remedy, because union members may file Title VII actions directly against their employers") (Powell, J.).

But even if that remedial concern were real, it is Congress' and *not* the federal courts' role to craft an appropriate solution, whether it be stiffer penalties for Title VII

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not immediately adopt the international union's "remedy" and follow its terms the international could only effectuate such a "remedy" by placing the local union in trusteeship and assuming its day-to-day operations. Congress, however, has provided in the Labor Management Reporting and Disclosure Act that a local union subjected to a trusteeship has the right, *inter alia*, to a "fair hearing" in which it is apprised of the allegations against it and given an opportunity to defend against those allegations. 29 U.S.C. § 464. Thus, if the local union contested the discrimination claims, international unions would be required to conduct "mini-§ 1981/Title VII trials" in order to address the merits of those claims—presumably without regard for whether those claims were the subject of an EEOC or court proceeding.

violations, enhancement of the EEOC's enforcement powers and resources, or imposition of the "affirmative duty" posited by the courts below. *Cf. Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 213, 218 (1979) ("[W]e reject petitioner's suggestion that Congress' policy in favor of arbitration extends to imposing an obligation on the respondent[] [international union], which agreed to arbitrate grievances [under a collective bargaining agreement], to use reasonable means to try to control [its affiliated] locals' actions in contravention of that agreement.").

(b) Given all this it is hardly surprising that in the context of local union actions in violation of the federal labor relations statutes, both *this* Court and *every* Court of Appeals presented with an "affirmative duty" claim—including the Sixth Circuit itself—has rejected that claim. *See Carbon Fuel*, 444 U.S. at 213, 217-18 (an international union has no affirmative duty to "use all reasonable means available to it to prevent [unlawful 'wildcat'] strikes [by affiliated local unions] or bring about their termination"); *Phelan v. Local 305, United Ass'n*, 973 F.2d 1050, 1061 (2d Cir. 1992) ("An international union has no independent duty to intervene in the affairs of its local chapters, even where the international has knowledge of the local's unlawful acts"), *cert. denied*, 507 U.S. 972 (1993); *Brenner v. Local 514, UBC*, 927 F.2d 1283, 1292 (3d Cir. 1991) (an international union has no "legal obligation to "intervene to rectify . . . possible abuse[s] by [its affiliated] locals"); *R.E. Chapa v. Local 18*, 737 F.2d 929, 932 (11th Cir. 1984) ("mere constructive knowledge of possible illegal activity on the local level" does not suffice "to impose a legal duty to intervene on the national union"); *Shimman v. Frank*, 625 F.2d 80, 99 (6th Cir. 1980) (refusing to impose on international unions "a duty to oversee and correct . . . anti-

dissident abuses" at the local union level; "[o]therwise, [i]nternational [u]nions could be destroyed by liability findings based on a hindsight analysis of what they should have done").

In sum, the panel majority's "§1981/Title VII affirmative duty" holding flies in the face of the statutory language, this Court's § 1981 case law, and the general federal employment and labor statutes case law.

II. THE COURT OF APPEALS' VICARIOUS LIABILITY RULING

The most basic rule of the common law of agency and the rule that guided the Court in the *Coronado Coal* case is this: one legal person with the "right to control" the conduct of a second legal person's affairs—such as an international union vis-a-vis affiliated local unions and a parent corporation vis-a-vis subsidiary corporations—that does not take action to exercise that right is *not* vicariously liable for the second legal person's wrongful actions. It follows that nothing in the law of agency imposes any duty on an international union/parent corporation to exercise its residual right to control the conduct of an affiliated local union's/subsidiary corporation's affairs or any vicarious liability on the international union/parent corporation by reason of the non-exercise of that right.

The courts below took a contrary view. The District Court predicated LIUNA's vicarious liability here squarely on the Internation Union's "acquiescence" in the form of LIUNA's failure to take action to intervene in Local 496's affairs to "oppose" and to "correct[]" the Local's discriminatory employment practices. Pet. App. 104a-106a. And, the Court of Appeals, in affirming the District Court's vicarious liability ruling, predicated that liability on LIUNA's "neglect[]" in "remedy[ing] the al-

leged discrimination when it learned of the plaintiffs' claims" Pet. App. 22a; *see also supra* pp. 7-8 and note 3.

This grounding of vicarious § 1981/Title VII liability on international union inaction where there are claims that a local union is engaging in discriminatory employment practices is in conflict with *every* other Court of Appeals' decision in point, as well as this Court's decisions delineating the governing common law agency principles.

(a) The D.C. Circuit in *Berger v. Iron Workers Local 201*, 843 F.2d 1395 (D.C. Cir. 1988), and Judge Batchelder in her dissenting opinion below, canvas the relevant Court of Appeals' decisions and we therefore restrict ourselves to summarizing the most salient points.

(i) In *Berger*, the D.C. Circuit, after discussing the Court of Appeals' decisions to that point, concluded *first*, that vicarious § 1981/Title VII liability is grounded in the common law of agency, 843 F.2d at 1427-1428; *second*, that such liability must be based "on something more than the abstract and unbounded premise that the entities regulated by those laws have an 'affirmative duty' to end discrimination," *id.* at 1429; and *third*, that the decisive factor is whether the international union was actively " 'involv[ed]' " in the affiliated local union discriminatory employment practices in question, *id.* at 1428 (quoting *Sinyard v. Foote & Davies*, 577 F.2d 943, 945 (5th Cir. 1978)).

Thus, the *Berger* court explained, the Fifth Circuit in *Sinyard* had *rejected* the " 'blanket imposition of an affirmative duty on international unions to police their locals to insure nondiscriminaton,' " and had "*exonerate*[*d*] the international" of vicarious liability in the absence of any evidence that the international affirmatively " 'caused,' " " 'participated in' " or " 'approv[ed]' " the discrimination

complained of. 843 F.2d at 1428 (quoting *Sinyard*, 577 F.2d at 947) (emphasis added).

Conversely, vicarious liability had been imposed on the international union defendants in *Myers v. Gilman*, 544 F.2d 837 (5th Cir.), *cert. denied*, 434 U.S. 801 (1977); *Howard v. International Moulders & Allied Workers Union*, 779 F.2d 1546 (11th Cir.), *cert. denied*, 476 U.S. 1174 (1986); and *Kaplan v. International Alliance of Theatrical & Stage Employees*, 525 F.2d 1354 (9th Cir. 1975), on the basis of the international unions' active involvement in the negotiation of the discriminatory collective bargaining agreement provisions in question.[6]

Applying these legal principles to the matters before it, the *Berger* court found an international union vicariously liable for certain discriminatory membership practices by its local union affiliate, *see* 843 F.2d at 1405-1406, but *not* for the local union's job referral of one of the plaintiffs (Bellamy) at reduced wages in retaliation for Bellamy's complaints regarding the local's membership practices, *id.* at 1426. As to the former, the *Berger* court found that "the [i]nternational was involved with the membership practices of Local 201 to such an extent that the District Court could infer that the local is the agent of the international with respect to [those] practices." *Id. at* 1431. As to the latter, "[i]n contrast," there was "not a shred of evidence nor any finding by

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[6] In *Myers*, the international had " 'provided an advisor to the local in its negotiations and . . . approved the resultant collective bargaining agreement' " (quoting 544 F.2d at 851); in *Howard*, the international had " 'worked closely' with local negotiators, resulting in [the] discriminatory bargaining agreement" (quoting 779 F.2d at 1548); and in *Kaplan*, the international had both "negotiated and signed [the] discriminatory collective bargaining agreement" (citing 525 F.2d at 1360). *See Berger*, 843 F.2d at 1428.

the District Court linking the [i]nternational to Bellamy's wage cut." *Id.* at 1433.

(ii) In her dissenting opinion below, Judge Batchelder undertook the same review and analysis of the case law that the *Berger* court had undertaken—albeit with the benefit of *Berger* itself on the books—and concluded that "*Berger* aptly ties together the existing case law and sets forth the correct approach." Pet. App. 59a n.16.

Thus, Judge Batchelder agreed with the *Berger* court that the decisive factor in each case had been whether the international union had been "involved" in some affirmative matter in the discriminatory acts in question:

> In *Berger*, the court found an agency relationship because, in addition to the international union's constitutional provisions providing the international with oversight authority over the local's membership practices (*which alone would not be enough to find the agency relationship*, 843 F.2d at 1431), the international had formally endorsed the establishment of the discriminatory practice in question and was actually involved in its implementation. *Id.* at 1430-32. In the cases cited by Plaintiffs, the provisions in question were themselves discriminatory and were explicitly negotiated by the international. [Pet. App. 61a-62a (emphasis added).]

(b) The panel majority decision imposing vicarious § 1981/Title VII liability on LIUNA in the circumstances here presented is squarely in conflict with this otherwise unbroken line of Court of Appeals' decisions.

LIUNA has been mulcted with vicarious liability damages for Local 496's *racially-discriminatory administration* of the facially non-discriminatory employment referral system provided for by the PLA (and, subsequently, the Maintenance Agreement) governing the Perry project even

though, as the panel majority itself recognized, all decisions/actions respecting the administration of that referral system were made/taken by Local 496 officials, and "[*n*]*o LIUNA representatives or agents were involved.*" Pet. App. 5a (emphasis added). *See also id.* at 62a ("Plaintiffs have failed to present any evidence indicating that LIUNA supported or approved of Local 496's decision in fact not to comply with the PLA, or allegedly to make exceptions in their compliance for a number of white relative/friends.") (Batchelder, J., dissenting).

Simply put, it is a startling departure from the heretofore uniform Court of Appeals' law to find an international union vicariously liable for local union acts of discrimination in which the international was *not* "involved" in any way, shape or form. *Cf. Berger, supra,* 843 F.2d at 1433; *Sinyard, supra,* 577 F.2d at 947.

(c) Indeed, the panel majority treated international union involvement or non-involvement in Local 496's discriminatory employment practices as all but an irrelevance. The one exception is its reference to the constitutional working-at-the-calling rule, by which, said the panel, LIUNA "instigat[ed], support[ed], rati[fied] or encourag[ed]" the discriminatory acts of the Local. Pet. App. 24a. But the panel majority's own recognition that the constitutional working-at-the-calling rule was *inapplicable* here shows that this is an empty rhetorical flourish. The provision that governed the Local's referral system was the PLA hiring provision and *not* the constitutional working-at-the-calling provision. The former took precedence over the latter and by so doing limited the scope of—or, in the majority's phrase, "waived"—the latter. *See supra* p. 4 & note 1. The proposition that under the applicable agency law standard an international union is liable for an affiliated local

union's racially-discriminatory acts by reason of an *inapplicable* background union constitutional rule is one that falls of its own weight.

(d) This Court has not spoken to the § 1981/Title VII vicarious liability issue presented here. But the Court has given the most mature consideration to the applicable federal common law agency principles in the line of labor relations statute cases from *Coronado Coal* to *Carbon Fuel*. Those decisions, we submit, make it plain that the vicarious liability "acquiescence" theory of the courts below is entirely without substance.

Carbon Fuel involved an effort by the plaintiffs to hold the United Mine Workers of America vicariously liable under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, for a series of unlawful "wildcat" strikes by its local union affiliates. In treating with this issue, the Court began by noting that Congress had adopted the common-law agency test for the imposition of vicarious liability under LMRA § 301. 444 U.S. at 216-17. The Court then went on to reaffirm Chief Justice Taft's *Coronado Coal* ruling "that to find the [international] union [vicariously] liable 'it must be clearly shown that what was done was done by their agents in accordance with their fundamental agreement of association.'" *Carbon Fuel*, 444 U.S. at 217 (quoting *Coronado Coal*, 268 U.S. at 304). And *Carbon Coal* concludes by making it clear that the *Coronado Coal* vicarious liability standard requires international union "authoriz[ation of], participat[ion] in, or ratifi[cation of]" the local unions' wrongful acts. *Id.* at 216.[7]

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[7] The Court noted that this common-law liability standard contrasted with "the very loose test of responsibility" that had obtained under the pre-1935 version of the LMRA. *See* 444 U.S. at 217.

By its plain terms, the *Coronado Coal/Carbon Fuel* "authorization/participation/ratification" standard of vicarious liability *excludes* mere "acquiescence" as the basis for the imposition of such liability, as *Carbon Fuel* makes clear:

> Petitioner makes the distinct argument that we should hold the International liable for its *own* failure to respond to the locals' strike. In the face of Congress' clear statement of the limits of an international union's legal responsibility for the acts of one of its local unions, *it would be anomalous to hold that an international is nonetheless liable for its failure to take certain steps in response to actions of the local.* [*Id.* at 217-18 (first emphasis by Court); (second emphasis added).]

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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FILED

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OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,
Petitioner,

v.

DAVINE ALEXANDER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-3806/3823/3854/3857/3858

DAVINE ALEXANDER, ET AL.,
Plaintiffs-Appellees/
Cross-Appellants (96-3858),

v.

LOCAL 496, LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA; FLOYD CONRAD,
Defendants-Appellants
(96-3823/3854)/Cross-Appellees,

LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA,
Defendant-Appellant
(96-3823/3854)/Cross-Appellees.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

No. 84-03916—Kathleen McDonald O'Malley,
District Judge.

Argued: August 6, 1998

Decided and Filed: April 30, 1999

Before Keith, Batchelder and Cole, Circuit Judges.

OPINION

R. GUY COLE, JR., Circuit Judge. Defendants, Local Union 496, Laborers' International Union of North America ("Local 496"), Floyd Conrad, and Laborers' International Union of North America ("LIUNA"), appeal the district court's order finding them liable for race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and (c), and 42 U.S.C. § 1981.

Plaintiffs, all African-American persons who sought membership in Local 496 or referral for jobs at the Perry Nuclear Power Plant ("Perry"), cross-appeal the district court's order calculating damages and its order sanctioning plaintiffs' counsel for alleged failure to comply with LIUNA's discovery requests.

For the following reasons, we AFFIRM the judgment of the district court with respect to the defendants' appeal and AFFIRM the judgment of the district court with respect to the plaintiffs' cross-appeal.

I. BACKGROUND

The facts in this case implicate the relationship among the plaintiffs, Local 496, LIUNA, and Perry, where members of the plaintiff class sought employment. All plaintiffs, including the named plaintiff, Davine Alexander, were black applicants whom Local 496 rejected for membership.

Work began at Perry, which is located in Lake County, Ohio, in the early 1970s. In 1973, Local 496[1] signed a

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[1]Through its parent, LIUNA, Local 496 is a member of the AFL-CIO. Local 496's jurisdiction is limited to building and construction work in Lake County, Ohio.

project labor agreement with the Cleveland Electric Illuminating Company, under which Local 496 was to act as the exclusive hiring hall for laborers at Perry during the plant's "construction phase," which lasted until 1985. During this time, Perry was the primary employer of laborers in Lake County. However, Perry by no means exclusively employed laborers who resided in Lake County; laborers from several neighboring counties also coveted work at the plant, in large measure because of the relatively high wages Perry contractors offered. Perry laborers earned approximately $14.00 per hour, compared to the average $6.66 an hour other workers, including those in professional occupations, earned in the same geographic area.

Local 496's membership has always been overwhelmingly white. For example, between 1980 and 1985 blacks comprised only between 2.88% and 3.59% of its total membership. During this same time period, the union accepted 54 new members, only one of whom was black.[2] African Americans who sought a referral to Perry from this union faced daunting opposition. According to the project labor agreement, Local 496 was to refer both union members and non-members for laborers' positions at Perry. It failed to do so. Furthermore, Local 496's constitution, which is the Uniform Local Constitution of the Laborers' International Union of North America, requires that a person seeking union membership first be employed as a laborer in Lake County. This "working-in-the-calling" rule requires non-members seeking induction into Local 496 to first secure work at a "union shop." Conversely, in the event that an individual secured such work, he or she was required to

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[2]Furthermore, between 1975 and 1979, Local 496's membership increased by more than 500%. During the same time, black membership increased from approximately 12 members to 18 members. Between April 1982 and February 1984, 42 new members joined Local 496, none of whom was black.

join the union within eight days of beginning employment. Essentially, then, the project labor agreement, which obligated Local 496 to treat members and non-members alike for the purposes of referrals, was to constitute a contractual waiver of the working-in-the-calling rule. Unfortunately for the plaintiffs, despite this waiver, union personnel selectively enforced the working-in-the-calling rule to effect the exclusion of black prospective members. Most markedly between 1975 and 1985, a period of rapid union growth, Local 496 regularly waived the working-in-the-calling requirement for white applicants. The union declined to accord African-American applicants the same benefit. Indeed, Floyd Conrad, business manager of Local 496, admitted that the union failed to refer a single black non-member to Perry.

The white applicants for whom the union waived its working-in-the-calling rule were, more often than not, relatives of Local 496 members. During the relevant time period, over 30% of union members had relatives who were also union members. Moreover, one of the principal means of acquiring Local 496 membership or an employment referral from the union was the request of a relative or friend who was already a union member. Sometimes, union members asked the union's business manager for a waiver of the working-in-the-calling rule on behalf of their cronies. Alternately, union members working as stewards or foremen at Perry simply approached employers and contractors at the plant and recommended their relatives for available positions. This sort of direct access to Perry employers was only available to people already employed at the plant, because of the plant's security requirements.

The ease with which white members of Local 496 bolstered their ranks with friends and relatives contrasts starkly with the barriers their black counterparts confronted

when they sought to act similarly. On several occasions, Donald Robinson, one of the few African-American members of Local 496, attempted to refer black friends and relatives to Conrad for positions at Perry. Conrad consistently ignored Robinson's requests. The story of Cheryl Journigan, a class member and relative of Donald Robinson's, illustrates Conrad's treatment of black applicants. Journigan testified that in 1985, she repeatedly sought union membership or employment referrals by calling and appearing at Local 496's union hall. Journigan recalled that Conrad invariably refused to return her telephone calls or instructed union secretaries to tell Journigan he was absent. Deborah Bracale, Conrad's secretary at the time, corroborated Journigan's account. At Conrad's direction, union personnel similarly rebuffed other African Americans seeking union membership or employment referrals. Thus, several factors, including nepotism, inequitable application of the working-in-the-calling-rule, and security at Perry, all converged to exclude black applicants from union membership and employment referrals.

After the plant's construction phase ended, maintenance work at the plant began. This work was performed pursuant to a 1985 National Maintenance Agreement, which LIUNA signed but Local 496 did not. However, the Maintenance Agreement provided that Local 496 was to act as LIUNA's agent in filling all laborer vacancies at Perry. No LIUNA representatives or agents were involved in administering the referral system.

After a decade of unsuccessful attempts to thwart the union's discriminatory membership restrictions, several black applicants initiated this class action in December 1984. Subsequently, by orders dated October 28, 1985 and March 6, 1986, individual discrimination suits filed by

plaintiffs Ron Colvin, Richard Lilly, Edward Turner II, Percy Pouewells, Lee Coffee, Sr., Isiah Johnson, Jr., and Jimmie Rice, against Local 496 and Conrad were consolidated with the class suit. Cheryl Journigan, the last class member to file EEOC charges of discrimination against the defendants, did so on January 10, 1985. On January 26, 1988, the district court certified the class to include:

> All Black persons who, on or before [January 26, 1988], have sought membership in Local 496 and/or employment either by application or by referral under the policy described in the collective bargaining agreement of March 9, 1973, by which the defendant union agreed to make referrals to employers at the Perry Nuclear Power Plant site.

LIUNA was aware of this action from its inception. Beginning in 1984, Business Agent Conrad regularly informed the regional office of LIUNA, specifically LIUNA's Regional Manager, Thomas J. Arconti, about charges lodged with the Equal Employment Opportunity Commission ("EEOC"), lawsuits filed by the plaintiffs, and of all findings of the EEOC related to the allegations against the local union. LIUNA's regional officers, the EEOC and the National Labor Relations Board, in turn, notified the General President of LIUNA of such events. In addition, the constitutions of Local 496 and LIUNA empowered LIUNA to intervene in the affairs of Local 496. Nevertheless, LIUNA never investigated the plaintiffs' charges of discrimination. Having discovered LIUNA's awareness of their EEOC charges against Local 496, in September 1989, plaintiffs Colvin and Tomblin filed additional EEOC charges against the parent union, claiming it intentionally refused to investigate the alleged discrimination. On January 12, 1990, the class moved to

amend its complaint to add LIUNA as a defendant. Although the suit was originally to be tried on January 17, 1990, the district court found that LIUNA was an indispensable party and on January 19, 1990, accordingly granted the plaintiffs leave to amend their complaint. On January 22, 1990, Tomblin and Colvin filed amended EEOC charges of discrimination, again alleging that LIUNA had intentionally neglected to investigate their charges of discrimination against the other defendants. After Colvin received his EEOC right-to-sue letter, the plaintiffs filed their amended complaint, adding LIUNA as a defendant, on March 30, 1990.

After protracted preliminary proceedings, the plaintiffs had their day in court. The trial was bifurcated, first to determine the issue of liability, and then, if the district court found the defendants liable, to ascertain the amount of damages. A bench trial determining liability took place in the spring of 1991. On December 10, 1991, the district court found the defendants liable for both disparate treatment and disparate impact racial discrimination, in violation of Title VII and § 1981. Specifically, the district court found that as a result of the discriminatory application of its facially neutral membership requirements, Local 496 refused African Americans union membership in violation of federal civil rights law. The district court also determined that in order to deter black applicants and "keep Local 496 mainly an all white union[,]" African Americans applying for membership into Local 496 "were met with a reluctant or even, at times, hostile attitude of [Floyd Conrad]." In addition, the district court concluded that LIUNA was liable for Local 496's discriminatory practices because the local union acted as its parent's agent, and the international union breached its affirmative duty to ensure the local's compliance with federal civil rights law. During the damages trial in 1996, the parties reached a partial

settlement. Local 496 agreed to an initial payment of $100,000, and LIUNA agreed to an initial payment of $200,000. The parties also agreed to a system by which Local 496 would give plaintiffs preference in employment referrals. Whether the plaintiffs receive any additional sum depends on the outcome of this appeal. Following a hearing, the district court approved the settlement in June 1996. This timely appeal followed.

II. ANALYSIS

A. Defendants' Appeal

1. Disparate Treatment Liability

The defendants first argue that the district court erred in determining that they unlawfully subjected the plaintiffs to disparate treatment because of their race. This court reviews a district court's finding of facts made after a bench trial for clear error and reviews a district court's conclusions of law *de novo*. See *Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 938 (6th Cir. 1997). When reviewing for clear error, we must affirm the trial court unless we are left with the definite and firm conviction that a mistake has been committed. See *EEOC v. Atlas Paper Box Co.*, 868 F.2d 1487, 1493 (6th Cir. 1989) (citation and quotation omitted).

A plaintiff may create a presumption of discrimination pursuant to the *McDonnell Douglas* burden-shifting principle. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973). Under the *McDonnell Douglas* framework, a plaintiff bears the burden of establishing by a preponderance of the evidence a *prima facie* case and creating a presumption of discrimination by demonstrating: (1) membership in the protected class; (2) that he or she suffered from an adverse action; (3) that he or she was

qualified for the position; and (4) that he or she was treated differently from similarly situated members of the unprotected class. See *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992) (citing *McDonnell Douglas*, 411 U.S. at 803); see also *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1996). Once the plaintiff establishes a *prima facie* case, a defendant may offer any legitimate, non-discriminatory reason for the action, which the plaintiff may then rebut with evidence of pretext; however, the burden of proof at all times remains with the plaintiff. *Hartsel*, 87 F.3d at 800 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)).

In this case, the district court found that pursuant to the *McDonnell Douglas* framework, the plaintiffs demonstrated that the defendants subjected them to racially based disparate treatment. First, the district court determined that the plaintiffs established a *prima facie* case by showing that: (1) they are black; (2) they were available for referral by the union for job opportunities at Perry; (3) Local 496 did not refer plaintiffs for employment opportunities at Perry; and (4) white non-union members were referred for work and made members of Local 496, during the same time plaintiffs had applied and been refused.

We agree. Floyd Conrad selectively enforced, to the detriment of black applicants, the Uniform Constitution's working-in-the-calling requirement. Conrad testified that white union members asked him "a thousand times or more" to admit unemployed relatives to Local 496, and that he obliged them; he also testified that he had admitted into the union his own unemployed relatives, including his father.[3]

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[3] Additional white relatives of union members whom Conrad admitted to the union although they were not then "working in the calling" include: Donald Crofoot's son-in-law, David Yankee; Randy Isarelli's uncle, Thomas Isarelli; David Russka; Robert Mackey; Thomas Schroeder; James Vechery, Jr.; Robert

During the same time period, when Donald Robinson advised several unemployed African Americans to seek membership in Local 496, Conrad refused them all.[4] Moreover, at trial, Conrad admitted that whenever a contractor specifically requested that Local 496 refer a black person for employment, Conrad would call Local 860 of Cleveland, which had a higher percentage of African-American members than Local 496, to suggest that the Cleveland union refer one of its members. Conrad thereby avoided referring for employment, and subsequently admitting into Local 496, any African-American applicants.

Furthermore, African Americans suffered disparate treatment with regard to Local 496's Perry referral policy itself; after the union changed its Perry referral policy in 1987, it failed to make this change known to black applicants, effectively ensuring that they would not be referred. Prior to 1987, Local 496 did not have a written referral policy for Perry; however, it admits that it only referred members to Perry, in contravention of the project labor agreement. Local 496's practice was to allow members and, occasionally, non-members to sign a notebook located in the union indicating that they wished to be referred. Conrad would then compile a master list from the notebook containing the

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Lohman; Donald Patton; Mickey Fisher; and two sons of Local 496's Field Representative, Rudy Bracale.

[4]Defendants contend that they did, in fact, waive the working-in-the-calling requirement for several African Americans. The record demonstrates that this is not the case. Two of those that the defendants claimed they waived the requirement for were already members of another union. The union constitution allows persons to freely transfer between unions. The remaining individuals had either obtained employment that was to begin once they were admitted to the union or had obtained letters indicating that they would be considered for employment once they were admitted to the union. The record indicates that the union considered such people working in the calling. The defendants point to no unemployed black non-member who was admitted to the union.

names of members only. This practice led to National Labor Relations Board charges against Local 496 and eventually to the written 1987 referral policy. Pursuant to the new policy, Local 496 maintained a single list of both members and non-members wishing to be referred to Perry. Local 496 made referrals from this list, in order. However, persons on the list were required to inform Local 496 monthly that they remained unemployed and interested in Perry. Otherwise, their names were removed from the referral list. Although this policy was facially neutral, Conrad did not inform class members of the new procedure. Members, however, were informed via posters hung in locations throughout the union hall to which only members had access. Consequently, class members' names were not retained on the union's referral list, and Local 496 never referred any for employment under this new policy.

For example, on or about January 22, 1990, plaintiffs Art Tomblin and Ronald Colvin appeared at Local 496's hiring hall seeking referral for employment. Pursuant to the October 1987 referral policy, the union representative asked Colvin and Tomblin to sign their names on the out-of-work list. They were 92nd and 93rd on the list at the time they signed up. On February 1, 1990, the union secretary prepared a new out-of-work list and deleted the names of the individuals on the January list who had received referrals for employment or had failed to notify Local 496 of their continued interest in a referral within the last thirty days. As a result of these deletions, Colvin and Tomblin advanced to positions 65 and 66 on the list. However, the union secretary responsible for preparation of the March 1990 out-of-work list dropped Colvin and Tomblin from the roster because they had failed to notify Local 496 of their continuing interest in referral for employment. According to the defendants, had Colvin and Tomblin indicated their continued interest, they would have remained on the roster

and been referred for work in May of 1992. Moreover, the defendants argue that they informed plaintiffs' counsel of the new referral policy, and, thus, by association informed the plaintiffs.

Defendants suggest that *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), supports their proposition that the knowledge of a litigant's counsel is imputed to the litigant. However, there are exceptions to this rule when, as here, equity requires such. See *Partlow v. Jewish Orphans' Home of Southern Cal.*, 645 F.2d 757, 758-62 (9th Cir. 1981). Quite frankly, we find it peculiar that although Local 496 supposedly implemented the new referral policy for the purpose of curing the previous policy's defects, the defendants never directly apprised African Americans seeking employment of the new referral system. Common sense dictates that if the defendants really intended to make employment opportunities available to all, they would have, as Magistrate Judge Hemann stated, "implemented this desire by making the new referral rules readily available and/or made at least one telephone call to prospective workers." This is particularly true given Conrad's admission that he failed to refer a single non-member minority to work at Perry. In this case, the defendants' notice to plaintiffs' counsel of the facially neutral referral system does not absolve defendants of their continued discriminatory application of that system. Thus, we decline to extend the holding of *Link* to this case.

Incidentally, the record contains still more evidence supporting the district court's conclusion that plaintiffs made out a *prima facie* case. Conrad, in fact, blatantly displayed his personal hostility toward African Americans on several occasions. Don Robinson and Rudy Bracale, another member of Local 496, both testified that Conrad referred to Robinson by a racial epithet on at least two

occasions. See *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354 (6th Cir. 1998) (recognizing that discriminatory remarks of decisionmakers are relevant to show motivations for their actions); *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1248 (6th Cir. 1995) (recognizing that employer's repeated use of racial epithets constituted direct evidence of racial discrimination). Furthermore, after Robinson began questioning Local 496's discriminatory practices, Conrad retaliated by removing Robinson from his position as union steward "because he was bringing up minority stuff that was not his business." Taken as a whole, we view the above as undeniable evidence of racial animus and disparate treatment and accordingly affirm the district court's conclusion that the plaintiffs established a *prima facie* case.

Once the plaintiff establishes a *prima facie* case of discrimination, the defendant may respond by articulating a legitimate, non-discriminatory reason for its action. *Hartsel*, 87 F.3d at 799. In this case, the defendants claim that the business purpose for their working-in-the-calling policy was to protect unemployed union members from an influx of unemployed non-members attempting to join the union. The district court found this reason to be pretext for discrimination, and the record supports the district court's conclusion. Quite simply, the defendants selectively enforced the working-in-the-calling requirement. As we have previously discussed, Conrad testified that he often admitted unemployed relatives of white union members. The fact that the defendants offered union membership to unemployed white non-members while they refused membership to African-Americans, even those who had been offered employment, plainly suggests that Conrad was less concerned with applicants' employment status than he was with their race. This evidence negates the defendants' proffered reason for refusing African-American applicants

union membership, and the plaintiffs have thus met their burden of establishing pretext. See *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994) (recognizing that showing that the proffered reason did not actually motivate the defendant is sufficient to establish pretext).

The district court's conclusion with regard to disparate treatment was not clearly erroneous. To the contrary, we are hard-pressed to imagine a race-discrimination case with more explicit evidence of disparate treatment. We accordingly affirm the district court's conclusion that the defendants engaged in racially based disparate treatment in violation of Title VII.

2. Disparate Impact Liability

The defendants argue that the district court erred in finding that the union's facially neutral policies had a disparate impact upon the plaintiffs, in violation of Title VII of the Civil Rights Act of 1964. The challenged practices are: (1) Local 496's working-in-the-calling rule; and (2) its practice of referring only union members for employment. The district court found that the plaintiffs presented statistical evidence sufficient to establish a *prima facie* case of disparate impact discrimination. The district court also determined that the defendants produced no job-related business justification for the policies engendering the disparate impact. We review a district court's finding of disparate impact discrimination for clear error. See *Atlas Paper*, 868 F.2d at 1493.

It is now well-settled that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, proscribes both overt discrimination as well as "practices that are fair in form but discriminatory in operation." *Griggs v. Duke* Power Co., 401 U.S. 424, 431 (1971). The plaintiff's burden

in a Title VII disparate impact case is to prove that a particular employment practice has caused a significant adverse effect on a protected group. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989); *Scales*, 925 F.2d at 908 (citing *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977 (1988)). Once the plaintiff establishes the adverse effect, the burden shifts to the employer to produce evidence that the challenged practice is a business necessity. See *Wards Cove*, 490 U.S. at 659.

Here, the defendants' principal argument is that the testimony of plaintiffs' expert, Brian Pendleton, Ph.D., was based on an overly broad labor pool and that as a result the district court erred in crediting his evidence over that of defense expert, Beth Martin, Ph.D. Dr. Pendleton based his statistics on a labor pool comprised of Lake, Ashtabula, Cuyahoga and Geauga Counties. The experts agreed that 93.5% of Local 496's membership came from these four counties. Dr. Pendleton's calculations led him to conclude that the percentage of African Americans in Local 496, approximately 5%, was two standard deviations lower than the percentage of African Americans in the four-county labor pool. Dr. Martin, on the other hand, based her statistics on a labor pool comprised only of the people employed in Lake County, where Perry is located. She narrowed her labor pool to this population based on her reasoning that Local 496's jurisdiction is limited to people employed in Lake County, regardless of their county of residence. Dr. Martin then determined that the percentage of African Americans in the relevant labor pool in Lake County and the number of black members of Local 496 both equaled 5%. Relying on this statistic, Dr. Martin reasoned that Local 496's African-American membership mirrored the African-American population in the relevant labor market and, on this basis, concluded that the union's policies had no disparate impact on the plaintiffs.

The district court found that the labor pool upon which Dr. Pendleton based his conclusion was overly broad, while Dr. Martin's was overly narrow. The district court nevertheless concluded that the "statistical disparities" were sufficient to establish a *prima facie* case of disparate impact discrimination. The district court reasoned that the union's membership and referral policies, characterized by the facially neutral working-in-the-calling rule and the policy of referring only union members for employment, "even if applied in a non-discriminatory fashion.... simply works to reinforce past patterns of discrimination."

We agree. As an initial matter, we note that despite whatever reservations the district court may have had with Dr. Pendleton's report, its determination of the "four-county area" as the correct labor pool was not clearly erroneous. The evidence in the record indicates that Perry paid extremely high wages for relatively low-skill positions. Therefore, applicants were exceedingly willing to commute from throughout the area to Perry. As the district court stated, then, "the gross disparity between the percentage of blacks in the membership of Local 496 and the four-county area" certainly supports a *prima facie* case. Moreover, we recognize that plaintiffs who present a statistical analysis of some challenged practice need not rule out all other variables to prevail. See *United States v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998) (citation omitted); see also *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) ("A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence."). The fact that Local 496 maintained policies that limited the union's membership to people who were employed in Lake County, whose workforce was 99% white, necessarily had a disparate impact on unemployed African Americans seeking membership in, or employment referrals from, the union.

Put differently, the overwhelming majority of workers eligible for union membership were white, in large measure because the union's own discriminatory practices prevented African Americans from obtaining employment in Lake County; Local 496's membership reflected this demographic, resulting in the de facto exclusion of African Americans from union membership. See *Ingram v. Madison Square Garden*, 709 F.2d 807, 810-11 (2d Cir. 1983) (affirming district court's finding that union's referral policies violated Title VII based on a combination of a few statistics and evidence that behavior of union personnel discouraged plaintiffs from seeking employment); see also *Gibson v. Local 40, Supercargoes and Checkers of the Int'l Longshoremen's and Warehousemen's Union*, et al., 543 F.2d 1259, 1268 (9th Cir. 1976) (stating that union's preference in referring relatives of union members when membership was overwhelmingly white had disparate impact in violation of Title VII even if defendants' nepotism was without discriminatory intent).

Once a plaintiff establishes that a particular practice has engendered a significant adverse effect, the defendant must produce evidence that the challenged practice is a business necessity. See *Wards Cove*, 490 U.S. at 659; *Warren*, 138 F.3d at 1091-92. Again, the defendants argue that their membership and referral policies, particularly the working-in-the-calling rule, were implemented to protect union members from competing for available positions with an influx of unemployed applicants. The district court correctly determined that this explanation does not justify the discriminatory effects of the challenged practices. Because, as explained above, Local 496 is the sole source of referrals for Perry and, in theory, it offered membership only to people employed in Lake County, its own practices served to reinforce the discriminatory impact on African Americans seeking employment at Perry, first by excluding them from

union membership and then by refusing to refer them for jobs because they are non-members. Such a business justification, which buttresses established forms of discrimination, cannot withstand a Title VII challenge. See *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 659 (2d Cir. 1971) (holding that employer's facially neutral practices which perpetuated effects of employer's prior discrimination violated Title VII); see also *Warren*, 138 F.3d at 1094 (stating that defendant employer should not escape liability because it maintained two discriminatory practices which operated concurrently to exclude black applicants); *Gibson*, 543 F.2d at 1267 (invalidating practice that operated to freeze the status quo of the defendant's discriminatory employment practices).

Based on the evidence in the record, the district court correctly concluded that the plaintiffs established a *prima facie* disparate impact claim, and the defendants' proffered justification was pretext for discrimination. We therefore affirm the district court's finding of liability with regard to the plaintiffs' disparate impact claim.

3. LIUNA's Liability

a. Statute of Limitations

LIUNA contends that the district court erred for a number of reasons by allowing plaintiffs' claims against it to proceed. First, LIUNA suggests that claims against it are barred by the statute of limitations governing Title VII claims.

Generally, the timely filing of a charge of discrimination with the EEOC is a condition precedent to a Title VII lawsuit. See *Atlas Paper Box*, 868 F.2d at 1495. Usually, if the alleged discrimination occurred more than 180 days prior to the plaintiff's filing of an EEOC charge, claims

implicating these actions are barred. See *id.* However, if the alleged unlawful practice occurs in a "deferral state," in this case Ohio, which has enacted its own laws prohibiting discrimination in employment, the plaintiff must file suit within 300 days of the alleged discriminatory act. See 42 U.S.C. § 2000e-5(e); *EEOC v. Penton Indus. Pub. Co.*, 851 F.2d 835, 837 n.5 (6th Cir.1988).

In this case, plaintiff Ronald Colvin first filed an EEOC charge against LIUNA on September 7, 1989. From this filing date, the 300-day statute of limitations applicable to Title VII actions filed in deferral states normally would preclude consideration of alleged violations occurring prior to November 11, 1988. Based on this chronology, LIUNA argues that none of the allegedly discriminatory acts occurring before this date supports a finding of liability against it. Because we conclude that the defendants, including LIUNA, are guilty of a continuing violation, as explained below, this argument is unavailing. This court has long recognized that an ongoing, continuous series of discriminatory acts may be challenged if one of those discriminatory acts occurred within the limitations period. See, *e.g.*, *Haithcock v. Frank*, 958 F.2d 671, 677 (6th Cir. 1992); see also *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991). "If a continuing violation is shown, a plaintiff is entitled to have a court consider all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996). We view continuing violations as falling into two categories of narrowly limited exceptions to the usual rule that statutes of limitations are triggered at the time the alleged discriminatory act occurred. See *Haithcock*, 928 F.2d at 677. The first category of continuing violations arises "where there is some evidence of present discriminatory activity giving rise to a claim of a

continuing violation; that is where an employer continues presently to impose disparate work assignments or pay rates between similarly situated groups." *Dixon*, 928 F.2d at 216. However, "at least one of the forbidden discriminatory acts must have occurred within the relevant limitations period." *Id.* The second category of continuing violations arises "where there has occurred a longstanding and demonstrable policy of discrimination. Unrelated incidents of discrimination will not suffice to invoke this exception; rather there must be a continuing overarching policy of discrimination." *Id.* at 217 (internal quotations omitted).

The facts in this case clearly support the district court's conclusion that the defendants are liable regardless of the statute of limitations because their actions were part of a continuing violation. Floyd Conrad testified that over a significant period of time, he refused African Americans membership in Local 496 based on the working-in-the-calling rule. The district court found that this practice continued at least through January 1990. Also as late as January 1990, Local 496's personnel failed to apprise African-American non-members of the procedure necessary to maintain their eligibility for employment referrals, though the union's overwhelmingly white membership was informed of the relevant procedure. Further, Floyd Conrad's testimony supports a finding that although the official membership and referral policies of Local 496 may have changed over the years, the practice of excluding black applicants continued into the relevant limitations period. Moreover, the working-in-the-calling rule, memorialized in Local 496's constitution and by-laws, resulted in the de facto exclusion of African Americans from the ranks of Local 496 as well as from employment at Perry. Thus, the defendants committed both types of continuing violations

recognized by this court: a series of related discriminatory acts and an established policy of discrimination.[5] See *Haithcock*, 958 F.2d at 678 (recognizing that a continuing violation exists where a policy of discrimination is longstanding and manifested in discriminatory treatment in more than one instance); see also *Hull v. Cuyahoga Valley Joint Vocational Sch. District Bd. of Ed.*, 926 F.2d 505, 510-11 (6th Cir. 1991) (stating that a complaint is timely filed and the continuing violation doctrine applies where a plaintiff challenges not just one incident of unlawful conduct but an unlawful practice that continues into the limitations period) (quotation omitted); see also *United States v. International Assoc. of Bridge, Structural and Ornamental Iron Workers, Local No. 1*, 438 F.2d 679, 683 (7th Cir. 1971) ("[I]t is proper for a court to look at past discrimination to see whether an employer is perpetuating a pattern of discrimination through other means. . . . [T]he past sheds light on the present as well as the future. Past discrimination may be relevant to show motive and intent as to present practice or to establish a pattern or practice of discrimination or to show that present practices are designed to perpetuate or have the effect of perpetuating a past policy of discrimination.").

Local 496 has a despicable and egregious history of excluding African Americans from membership. We will not ignore this legacy of discrimination, paradigmatic of a

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[5] Although exact dates are difficult to ascertain from the record, it appears that most of the class members approached Local 496 in the early and mid-1980s. Nevertheless, the record as a whole supports the conclusion that the defendants maintained racially discriminatory policies and practices well into the limitations period. In any event, the evidence certainly does not leave us with a definite and firm conviction that the district court committed a mistake in finding the defendants liable for a continuing violation. Therefore, we determine that the district court's finding was not clearly erroneous with regard to this issue. See *Atlas Paper Box*, 868 F.2d at 1493.

continuing violation. To do so would be inequitable and unjust. Therefore, because the defendants' actions constitute a continuing violation, the district court correctly considered those actions which took place prior to the limitations period, as well as those that occurred within the limitations period. Accordingly, we affirm the judgment of the district court with regard to this issue.

b. Agency and Affirmative Duty Theories

LIUNA contends that the district court erred by finding it liable for the alleged racial discrimination of Local 496. The district court found that LIUNA was liable both because Local 496 was acting as the international union's agent and because LIUNA breached its affirmative duty to oppose Local 496's discriminatory practices by neglecting to remedy the alleged discrimination when it learned of the plaintiffs' claims. Again, we review these findings of fact for clear error. See *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1407 (D.C. Cir. 1988).

Common law agency theories of vicarious liability govern the liability of international labor organizations for the acts of their local unions that violate Title VII and § 1981. See *id.* at 1427-28. At common law, a principal may be held liable for the intentional torts of its agent if the agent's conduct is within the scope of his agency and if, with the knowledge of the conditions, the principal intends the conduct or its consequences. See *id.* at 1430. In other words, in a case such as this, "a plaintiff must adduce specific evidence that the international 'instigated, supported, ratified, or encouraged' those actions, or 'that what was done was done by their agents in accordance with their fundamental agreement of association.'" *Id.* at 1427 (quoting *Carbon Fuel v. United Mine Workers*, 444 U.S. 212, 217-18 (1979)). Furthermore, where an agency relationship exists, international unions are not only vicariously liable, they

have an affirmative duty to oppose the local's discriminatory conduct. See *Sinyard v. Foote & Davis Div. of McCall Corp.*, 577 F.2d 943, 945 (5th Cir. 1978).[6] Thus, "[a]s a general proposition international labor unions must bear a heavy responsibility in giving effect to the remedial provisions of both Title VII" and § 1981. *Id.*

In this case, the district court correctly found that LIUNA is liable both vicariously and directly. LIUNA and Local 496 have clearly maintained a principal/agent relationship since March 1985 when LIUNA became a signatory to the National Maintenance Agreement, which included a provision stating that Local 496 was to fill all maintenance laborer positions at Perry.[7] However, the structure of the relationship between the local and the international was no different before this date, during Perry's construction phase. The working-in-the-calling requirement, which we have determined had a disparate impact on African Americans,

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[6] The Fifth Circuit has held that an international union is liable for a local's discrimination where a "sufficient connection" existed between the international and the local. See *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 851 (5th Cir. 1977). The D.C. Circuit determined that the Myers "sufficient connection" test was not meaningfully different from common-law agency principles. See *Berger*, 843 F.2d at 1428. We agree.

[7] The dissent reaches a different conclusion, relying on *General Bldg. Contractors Assn. v. United Eng'rs & Constructors*, 458 U.S. 375 (1982). Although that case did indeed involve a hiring hall and a claim of vicarious liability, it is distinguishable. The question there was whether an employer could be held liable for the discrimination of a union, obviously a very different question from the one at hand. "In the run of cases, the relationship between an employer and the union that represents its employees cannot be accurately characterized as one between principal and agent or master and servant. Indeed, such a conception is alien to the fundamental assumptions upon which the federal labor laws are structured." *Id.* at 393. The theoretical underpinnings of the National Labor Relations Act do not compel a similar result here. To the contrary, it would be alien not to find an agency relationship when an international union signed a contract stating that the local -- not the international -- would provide workers for the employer.

was in fact a product of LIUNA's own Uniform Local Constitution. Article III, §1(a) provides, "In order to be eligible for membership a person must be working in the calling within the territory of the Local Union in which the individual applies for membership." We are baffled and amazed as to how LIUNA can contend that it did not instigate, support, ratify, or encourage a policy that it created. Moreover, LIUNA was aware and on notice of the charges of discrimination filed against Local 496, as Floyd Conrad and the EEOC both informed LIUNA personnel of such developments. Thus the international cannot feign ignorance, and cannot be excused for breaching its duty to end Local 496's discrimination.[8] See *Berger*, 843 F.2d at 1428 ("Having. approved a practice of the local that was later found to be discriminatory in effect, the international

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[8]The dissent's recognition that LIUNA attempted to explain its failure to investigate the plaintiffs' charges of discrimination as "consistent with LIUNA's established practice upon receipt of similar complaints" begs the question whether the international's "established practice" was sufficient under the circumstances. According to LIUNA's answers to the plaintiffs' interrogatories, it customarily referred charges of discrimination against locals to the relevant regional manager, in this instance Arconti. Arconti died in 1989, prior to the addition of LIUNA as a defendant. However, between 1984, when the plaintiffs filed their first EEOC charge against Local 496, and 1989, Arconti never investigated Local 496's referral practices, much less sanctioned them. LIUNA conceded in its response to the interrogatories that it could not even verify whether Arconti ever met with representatives of Local 496 regarding the plaintiffs' charges. This leads us to wonder whether simply forwarding notice of charges of discrimination against a local union to the international's regional manager is an effective means of insuring the local's compliance with civil rights law. Moreover, we note that in this case the regional manager notified the national office of LIUNA of the charges in the first place. We cannot comprehend how simply circulating between LIUNA's national and regional offices notice of the same EEOC charges and complaints without subsequent investigation could sufficiently address the local's alleged racial discrimination. We question what incentive LIUNA's local unions have to comply with anti-discrimination statutes when they face no threat of sanction, or even investigation, by their parent union. Evidently, LIUNA's "established practice" was not incentive enough

would surely have been held accountable for the local's conduct under the agency standard of the common law. . ."); see also *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 736, n.32 (5th Cir. 1976) (stating that international unions who are parties to national agreements have a duty under Section 1981 to inquire into the effect of contract provisions when it is reasonable to assume that such provisions might lead to discrimination, and that international unions have an affirmative obligation to protect members from agreements they help negotiate when such agreements "lock in" past discrimination).

Here, the district court's conclusion that LIUNA is liable is based on an eminently reasonable interpretation of the relationship between the international and local unions. Because the record and the applicable precedent support the district court's conclusion that LIUNA is liable for Local 496's discriminatory practices and policies, we affirm the judgment of the district court on this issue as well.

4. Date of Accrual of Title VII Damages

Defendants contend that even if we affirm the district court's findings regarding liability, we should determine that the district court erred in determining the date upon which Title VII damages began to accrue against LIUNA. We review a district court's designation of the beginning of a back pay period for an abuse of discretion. See *Warren*, 138 F.3d at 1094.

Section 706(g) of Title VII, as amended in 1972, provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Opportunity] Commission." 42 U.S.C. § 2000e-5(g). Plaintiffs did not file an EEOC charge against LIUNA until September 7, 1989, and thus defendants argue that their Title VII liability did not accrue until

September 7, 1987. However, the first plaintiff to file an EEOC charge against Local 496 did so on February 1, 1984. The district court, citing *Romain v. Kurek*, 836 F.2d 241 (6th Cir. 1987), determined that back pay liability against LIUNA commenced more than two years before this earlier date, on February 1, 1982.[9]

Romain outlines the conditions under which an unnamed party may be sued pursuant to the EEOC right-to-sue letter that results from an EEOC charge. "[A] party must be named in the EEOC charge before that party may be sued under Title VII unless there is a clear identity of interest between the unnamed party and a party named in the EEOC charge." *Id.* at 245 (internal quotes omitted). In *Romain*, this court adopted two tests for determining whether a party shares an identity of interest with another party. Under the first, set forth by the Seventh Circuit in *Eggleston v. Chicago Journeymen Plumbers Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981), an identity of interest exists when the unnamed party possesses sufficient notice of the claim to participate in voluntary conciliation proceedings. *Romain*, 836 F.2d at 245 ("Courts generally find an identity of interest where the unnamed party has been provided adequate notice of the charge under circumstances which afford him an opportunity to participate in conciliation proceedings aimed at voluntary compliance."). The second, developed by the Third Circuit in *Glus v. G. C. Murphy Co.*, 562 F.2d 880 (3rd Cir. 1977), uses four factors to determine the relationship between the named and the unnamed parties at the time the charge was filed:

> (1) [W]hether the role of the unnamed party could through reasonable effort by the complainant be

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[9]In other words, the district court determined that back pay liability under Title VII commenced on the same day for both LIUNA and Local 496.

ascertained at the time of the filing of the EEOC complaint;

(2) [W]hether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings;

(3) [W]hether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party;

(4) [W]hether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Romain, 863 F.2d at 246. As might be expected, because we have found LIUNA vicariously liable for Local 496's discriminatory practices and directly liable for violating its duty to stop those practices, under either test LIUNA and Local 496 share an identity of interest.

With regard to the *Eggleston* test, LIUNA certainly had ample notice of the charges the plaintiffs filed against Local 496. Floyd Conrad notified regional LIUNA officials who then informed national LIUNA personnel of all charges and relevant EEOC findings in this case. In addition, the EEOC and NLRB directly provided LIUNA with copies of all charges alleging discrimination by Local 496. LIUNA enjoyed supervisory power to interfere in the affairs of Local 496 and chose not to exercise that power despite the ongoing charges of discrimination. In light of this fact, the district court's finding that LIUNA had been provided with adequate notice affording it an opportunity to participate in, or at least encourage the other defendants to participate in, conciliation proceedings is not an abuse of discretion.

With regard to the *Glus* multi-factor test, we add the following. First, the plaintiffs were unaware of LIUNA's involvement in the affairs of Local 496 until well after the filing of the original EEOC charge; moreover, one could hardly expect those excluded from union membership to understand the relationship between international and local unions at the time they filed EEOC charges. *Cf. Romain*, 836 F.2d at 245 ("The 'identity of interest' exception acknowledges the reality that laymen, unassisted by trained lawyers, initiate the process of filing a charge with the EEOC, and accordingly prevents frustration of the remedial goals of Title VII by not requiring procedural exactness in stating the charge."). Second, the interests of LIUNA and the local were identical in terms of achieving voluntary conciliation with the plaintiffs during EEOC proceedings. Third, LIUNA was aware of the EEOC proceedings and thus was not prejudiced by the plaintiffs' failure to name it in the original EEOC charge.[10] Therefore, under the Glus test, as under the *Eggleston* test, we conclude that LIUNA and Local 496 shared an identity of interest.

Because of this identity of interest, LIUNA could have been sued under the plaintiffs' first EEOC charge. Accordingly, then, the plaintiffs' second EEOC charge was not needed and we will not limit plaintiffs' Title VII damages by the date of this second, unnecessary charge. The Second Circuit reached a similar conclusion in *Cornwell v. Robinson*, 23 F.3d 694 (2nd Cir. 1994). *Cornwell*, like the plaintiffs in this case, was the victim of a pattern and practice of discrimination. Her original EEOC charge and her original complaint, both filed in 1986, named her employer and a few others. Both failed, however, to name

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[10] The fourth *Glus* factor is immaterial on these facts. LIUNA neither represented that plaintiffs' relationship with it should or should not be through Local 496.

the individual employees who had been harassing her. In June 1986, she filed a second EEOC charge naming those employees for incidents that took place the year after she filed her original charges. She eventually received a right-to-sue letter against those employees, but did not actually file a Title VII claim against them until 1992. After concluding that the incidents in 1986 were part of the same pattern and practice of discrimination that Cornwell had endured for several years, and thus were naturally "reasonably related" to the discrimination that she had complained of in her original EEOC charge, the Second Circuit concluded that Cornwell's claim against the employees was not time barred, despite the fact that Title VII requires plaintiffs to sue within 90 days of the receipt of a right-to-sue letter. The court concluded:

> we can see no basis in Title VII or in reason for concluding that the agency's response to her unnecessary administrative claim imposed on her time constraints to which she would not have been subject had she not filed the unnecessary claim. A contrary, "technical" reading of a remedial statute such as Title VII would be particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.

Id. at 706. We agree. Thus, we conclude that the district court did not abuse its discretion by determining that the parent union's liability began to accrue at the same time as the local union's liability on February 1, 1982, and we affirm the judgment of the district court with regard to this issue.

B. Plaintiffs' Cross-Appeal

1. Date of Termination of Damages

The plaintiffs argue that the district court erred in establishing January 15, 1992 as the termination date of damages. The plaintiffs suggest that the district court should have adopted the magistrate judge's recommendation that damages terminate on the date that final judgment in the case is entered. We review a district court's order establishing the termination date of damages for an abuse of discretion. See *Thornton v. East Texas Motor Freight*, 497 F.2d 41 6, 422 (6th Cir. 1974).

In this case, the district court declined to adopt the magistrate judge's recommendation that the termination date for damages coincide with the final judgment date. The district court reasoned that:

> The [order regarding liability] found [Local 496's] referral policy adopted in October 1987 to be 'facially objective and non-discriminatory. With that finding, injunctive relief and job opportunities were available to the class following the liability decision. On January 15, 1992, attorneys for the class were in a position to request injunctive relief regarding future referrals. There is no good reason to allow damages beyond January 15, 1992.... The ending date for all damages is January 15, 1992.

The district court's conclusion was not based on an erroneous finding of fact or an incorrect application of the law. Thus, it was not an abuse of discretion. See *Warren*, 138 F.3d at 1095; see also *Thornton*, 497 F.2d at 416 (concluding that district court's order establishing termination date of back pay relief in job discrimination

case on date the employer changed its discriminatory policy rather than the date when the court made the final award of damages was not an abuse of discretion). We accordingly affirm the judgment of the district court with regard to this issue.[11]

2. Sanction of Plaintiffs' Counsel

Plaintiffs contend that the district court erred by sanctioning their attorney for alleged misconduct pertaining to LIUNA's discovery requests. We review a district court's imposition of sanctions on attorneys for an abuse of discretion. See *Palmer v. United States*, 146 F.3d 361, 363 (6th Cir. 1998) (citing *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.*

As Magistrate Judge Hemann stated, the history of the discovery disputes that took place during the damages phase ofthis action "need not be repeated here. Suffice it to say that [Judge Hemann] spent considerable time dealing with defendants' complaints about plaintiffs' failures to provide in some cases any, and in most cases all, requested discovery." With regard to these complaints, LIUNA filed a motion to dismiss forty-four members of the plaintiff class. In opposing LIUNA's motion, all except six of the plaintiffs cured the complained-of deficiencies. Judge Hemann therefore recommended that the district court deny LIUNA's motion to dismiss, noting the huge number of interrogatories defendants propounded. Judge Hemann

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[11] Plaintiffs also challenge the accrual date of back pay against LIUNA under § 1981. Because of our conclusions with regard to the accrual of Title VII back pay against LIUNA, we decline to address this issue.

went on to suggest specific action with regard to the six stragglers. She also suggested that the district assess, against all forty-four plaintiffs who were the subject of LIUNA's motion to dismiss, the attorneys' fees LIUNA incurred in filing the motion to dismiss. The district court adopted the report and recommendation, but ordered that plaintiffs' counsel, rather than the plaintiffs themselves, pay the attorneys' fees.

Nothing in the record leads us to believe that the district court misapplied the law or based its imposition of sanctions on a clearly erroneous assessment of the evidence. Therefore, we conclude that the district court did not abuse its discretion and affirm the imposition of sanctions on plaintiffs' counsel.

III. CONCLUSION

For the foregoing reasons, with regard to the appeal, we AFFIRM the judgment of the district court in all respects. With regard to the cross-appeal, we also AFFIRM the judgment of the district court.

CONCURRING IN PART, DISSENTING IN PART

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part. For the reasons that follow, I would affirm the district court's finding of discriminatory impact, remand for further factual findings regarding discriminatory treatment, and reverse the district court's finding of liability against LIUNA. I concur in the majority's affirmance of the district court's imposition of discovery sanction against the individual Plaintiffs and Plaintiffs' counsel.[1]

This case involves an employment discrimination class action suit filed on December 20, 1984, brought under 42 U.S.C.A. § 2000e, *et seq.* (West 1994 & Supp. 1998) ("Title VII") and 42 U.S.C.A. § 1981 (West 1994 & Supp. 1998). Originally named as defendants were Local 496 of the Laborer's International Union of North America ("Local 496") and a number of electric power companies that were later dismissed from the suit. By orders dated October 28, 1985, and March 6, 1986, individual discrimination suits filed by Plaintiffs Colvin; Lilly; Turner, II; Pouewells; Coffee, Sr.; Johnson, Jr.; and Rice against Local 496 and Local 496's Business Manager, Floyd Conrad,[2] were consolidated with the class suit.

On January 26, 1988, the court certified a class of

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[1]LIUNA also claims that the district court erred in finding that discrimination occurred within the limitations period applicable to LIUNA and in holding LIUNA liable pursuant to a continuing violations theory. Plaintiffs also claim that the district court committed error in two of its damages rulings pertaining to LIUNA. Because I conclude that the district court erred in holding LIUNA liable, I would not address these issues.

[2]For ease of discussion, except where otherwise noted, we include Defendant Conrad in collective references to "Local 496."

> All Black persons who, on or before [January 26, 1988], have sought membership in Local 496 and/or employment either by application or by referral under the policy described in the collective bargaining agreement of March 9, 1973, by which the defendant union agreed to make referrals to employers at the Perry Nuclear Power Plant site.

Cheryl Journigan was the last class member to file an EEOC charge against Local 496; she filed on January 10, 1985. On September 7, 1989, Plaintiffs Colvin and Tomblin filed additional EEOC charges alleging that they had recently discovered that Laborer's International Union of North America ("LIUNA") was aware of their EEOC charges against Local 496 but had intentionally refused to investigate the matters; these were the first allegations in this case levied against LIUNA.

On January 12, 1990, the class moved to amend their complaint to add LIUNA as a party defendant. The suit originally was set for trial on January 17, 1990, but the trial court found that LIUNA was an indispensable party and on January 19, 1990, granted the Class leave to amend their complaint. On January 22, 1990, Plaintiffs Tomblin and Colvin filed "amended" charges of discrimination, again alleging that they had recently discovered that LIUNA had intentionally failed to investigate the discrimination charges. Colvin received his right to sue letter on March 26, 1990, and on March 30, 1990, the Class filed an amended complaint, adding LIUNA and Business Manager Conrad as party defendants.

The court bifurcated the liability and damages proceedings. After a 1991 trial on liability issues, on December 10, 1991, the district court found that Local 496 and Conrad had engaged in a pattern or practice of discriminatory treatment and were liable under a disparate impact theory, both in

violation of Title VII and § 1981. The court also ruled that LIUNA was similarly liable because LIUNA had an agency relationship with Local 496 and because it had an affirmative duty to oppose its local affiliate's discrimination.

During the discovery period of the damages phase, the court imposed sanctions on five individual Plaintiffs and on Plaintiffs' counsel for failure to comply with LIUNA's discovery demands. During the damages portion of the trial, the parties reached a partial settlement wherein Local 496 and LIUNA agreed to make an initial payment to the Class; additional damages payments depend on the outcome of this appeal, and all parties reserved the right to appeal any order other than the judgment journalizing the settlement. The district court approved the parties' settlement agreement, and on July 19, 1996, the court formally dismissed the class action suit. All parties timely noticed their appeals.

Appellants Local 496 and LIUNA now claim that the trial court committed clear error in finding that Plaintiffs proved race discrimination under either a disparate impact or a disparate treatment theory. Appellant LIUNA also asserts that the trial court erred in finding that LIUNA was liable pursuant to either an "agency theory" or an "affirmative duty" theory. Plaintiffs cross-appeal, claiming that the district court abused its discretion in imposing sanctions against Plaintiffs and their counsel for discovery violations.

I. Factual Background

A.

In 1973, Local 496 signed a project labor agreement ("PLA" or "1973 agreement") governing the construction of the Perry Nuclear Power Plant ("Perry"), which is located in

Lake County, Ohio. LIUNA was not a signatory to this agreement. In the absence of the PLA, LIUNA's Uniform Local Union Constitution, which governs Local 496, would require: "In order to be eligible for membership a person must be working at the calling within the territory of the Local Union in which the individual applies for membership." LUINA Uniform Local Constitution, Art. III, § 1(a). In other words, according to the Local Constitution, a nonmember must secure a union job before he or she is eligible to become a union member. If an individual obtained such a job, he or she was required to join Local 496 within eight days of beginning such employment.[3]

The PLA, however, required in part that applicants for work on the Perry project be referred without regard to union membership. Thus, the Perry contract essentially included a contractual waiver of the working-at-the-calling rule. Defendant Conrad admits that pursuant to this agreement, Local 496 operated as an "exclusive hiring hall"

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[3] The PLA was signed by representatives of Perry's owners and of all of the trades, including Local 496. The provision in question, Art. VIII, provides in pertinent part:

> Contractors performing construction work on the Perry Nuclear Power Plant project shall, in filling job vacancies, utilize the registration facilities and referral systems operated by the Local Unions in accordance with the provisions of applicable Federal and States laws.
>
> The selection of applicants for work on this project shall be on a nondiscriminatory basis *and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect of union membership, policies, or requirements.*

(emphasis added).

The PLA was revised in March 1983, but the provisions regarding hiring of laborers remained unchanged.

for laborers at Perry, and had an obligation to refer both members and non-members for the laborer jobs.

Perry's construction phase lasted from 1973 to 1985. Thereafter, work at Perry was considered "maintenance" and was performed under the National Maintenance Agreement, effective March 4, 1985. LIUNA signed the maintenance agreement; Local 496 did not. Local 496, however, continued as the referral agent for laborers at Perry.

Local 496's union hall is located in Madison, Ohio, and its geographical jurisdiction is limited to Lake County. Lake County is bordered to the east by Ashtabula County, to the south by Geauga County, to the west by Cuyahoga County, and to the north by Lake Erie. Local 496's craft jurisdiction is limited to commercial and industrial building construction. When Perry's owners first began to build Perry, a jurisdictional dispute arose between Local 496 and LIUNA Local 860, whose craft jurisdiction is "heavy construction," which includes roads, sewers, site preparations, bridges, dams, and airport runways, and whose geographic jurisdiction includes Lake, Cuyahoga, and Geauga counties. LIUNA resolved this dispute by splitting the work between the two Locals. Local 496, however, remained the exclusive referral source for laborers at Perry. As the Business Manager, Defendant Conrad personally had exclusive control over union referrals to all Perry contractors.

B.

Local 496's membership is overwhelmingly white. Between 1980 and 1985, the total number of active members ranged from 509 to 545, while the number of black members ranged from 16 to 20. During this same period, black members comprised between 2.88% and

3.59% of total membership. Approximately 30% (145 of 507) of Local 496 members were related to one another. Between April 1982 and February 1984, 42 new members, none of whom was black, were initiated into the Local 496. From 1980 to 1985, the union accepted a total of 54 new members, one of whom was black.

Over the years, the referral practices of Local 496 have varied. Prior to October 1987, the union did not have in place a written referral policy. Local 496 admits that in response to contractor requests during the pre-1987 period, the union referred only members, in contravention of the PLA. Unemployed members could sign a spiral notebook located in the union hall, and from that notebook, Conrad would compile a master list of unemployed members from which he made referrals. At most times, non-members could also sign the notebook, but they were not included on the master referral list. During this period, Local 496 accepted as new members those who obtained contractor-letters or were hired directly by contractors.

In 1987, however, as part of a settlement of an NLRB charge filed by a white non-member, Local 496 instituted a new, written, referral policy. Under this policy, both members and nonmembers could sign the unemployed list, and referrals were to be made in the order that the names appeared on the list. Each month, the secretary was to prepare a new master list, deleting the names of individuals from the prior month's list who either (1) had worked more than 40 hours the prior month, or (2) had not contacted the union during the prior month and informed the union that he or she was still unemployed and was still interested in staying on the list. Plaintiffs' counsel, Edward Kramer, received a copy of these rules on August 30, 1989.

Even with the changed referral policy, the union admitted that it never actually referred a non-member to a job at Perry.[4]

With one exception, however, after May 1985, no class member communicated with Local 496 for the purpose of becoming a union member and/or seeking a referral. Sometime between January 19 and 22, 1990, Plaintiffs Colvin and Tomblin went to Local 496's hall and signed the unemployed list. At the time of signing, their names were 92nd and 93rd on the list. While they were at the hall, no one informed Colvin or Tomblin about the monthly re-notification requirement.[5] Colvin and Tomblin testified that Mr. Harrington, a union representative, did tell them that to join the union, one must be working at the calling. On February 1, 1990, Local 496's secretary prepared a new unemployed list on which Colvin and Tomblin occupied the 65th and 67th positions. Neither Colvin nor Tomblin wrote or otherwise informed Local 496 during February 1990 or thereafter that he remained unemployed and continued to be interested in referrals. When the secretary prepared the March 1990 list, she removed Colvin and Thomas's names.

C.

LIUNA and Local 496 are separate entities; the locals negotiate their own contracts, spend their own funds, own their own property, *etc*. At all relevant times, the Local 496 referral system was administered solely by Local 496. The

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[4] In the settlement agreement, however, the parties stipulated that if he had been asked, Conrad would have testified that after the adoption of the 1987 referral rules, nonmembers who followed the policy "would" have been referred pursuant to the policy's written terms.

[5] Despite the fact that class counsel had a copy of the 1987 referral rules, he did not discuss the notification requirement or new referral rules with Colvin, Tomblin, or any other class member.

constitutions of LIUNA and Local 496, however, provide LIUNA with supervisory power over Local 496. LIUNA retained the power to suspend or dissolve the charter of Local 496, and testimony established that LIUNA had the authority to correct "blatantly" discriminatory policies of local affiliates.

The district court found that LIUNA "has continually refused to investigate charges of discrimination or take any action to correct [Local 496's] illegal conduct." Local 496 frequently notified LIUNA of the race discrimination complaints that had been lodged against it, and LIUNA kept a file of documents pertaining to the discrimination claims. No class member, however, ever contacted LIUNA regarding a discrimination complaint. In an interrogatory answer, LIUNA stated that it never investigated the specific discrimination complaints lodged with the EEOC by Colvin and Tomblin in 1984 against Local 496, but that it instead mailed copies of the complaints to Thomas Arconti, LIUNA's Regional Manager in charge of Local 496. It also stated that this was consistent with LIUNA's established practice upon receipt of similar complaints, and cross-references its answers to earlier interrogatories.[6]

The evidence of record shows that several times in 1984 and 1985, Thomas Arconti met with Local 496 members, a number of whom were black, to discuss problems they were

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[6]In those interrogatories, LIUNA stated:

> During the period from January 1, 1982, to the date of production, defendant LIUNA has not formally investigated a claim of racial discrimination against a local affiliate. Customarily, upon receipt of letters from members which charge a local affiliate with racial discrimination or with some other misfeasance or nonfeasance, the General President refers the letters over to the appropriate regional manager. The regional manager, in turn, normally contacts all the parties involved in an attempt to resolve the matter informally.

having getting referrals from Local 496. Also at that time, they discussed the discrimination complaints of a non-class member, Donald Robinson. Thomas Arconti died on May 1, 1989, prior to the filing of discrimination charges against LIUNA either with the EEOC or in the Amended Complaint; it is not clear from the record what his investigation disclosed.

II. Racial Discrimination.

Appellants Local 496 and LIUNA assert that the trial court committed clear error in finding that the Plaintiffs proved race discrimination under either a disparate impact or a disparate treatment theory. While I concur in the majority's conclusion that we must uphold the district court's finding of disparate impact, I believe that we cannot affirm the findings of disparate treatment because the dearth of relevant factual findings leave us unable to evaluate properly the court's finding of discriminatory treatment.

We review a district court's factual finding of discrimination only for clear error. *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 374 (6th Cir. 1984). Thus, findings with regard to the evidence necessary to establish a *prima facie* case of employment discrimination are reviewed under the clearly erroneous standard. See *id.* at 374-77.[7]

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[7]Local 496 also asserts that the district court improperly found that Conrad was "individually" liable under Title VII. For the record, we note that the court did not make such an explicit determination, instead stating that "Local 496 and Floyd Conrad have engaged in a pattern or practice of discrimination which constitutes an unlawful employment practice in violation of 42 U.S.C. §§ 2000e-2(a), (c), and 42 U.S.C. § 1981." In any event, we agree with Local 496 that for the same reasons as stated in *Wathen v. General Elec. Co.*, 115 F.3d 400 (6th Cir. 1997), with respect to the liability of an "employer's" "agents," Conrad cannot be held personally liable under Title VII as the agent of a "labor organization." See *id.* at 403-06; *cf.* 42 U.S.C. § 2000e-2.

Title VII prohibits discrimination by a union against its members on the basis of race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(c). Racial discrimination is also prohibited by 42 U.S.C.A. § 1981; claims brought under § 1981 are governed by the same evidentiary framework applied to Title VII claims. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989).

In cases where plaintiffs allege that because of their race they were treated differently from Caucasian individuals, plaintiffs bear the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In these "disparate treatment" cases, plaintiffs must prove that the defendant had a discriminatory intent or motive, which in some situations may be inferred from the mere fact of differences in treatment. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988); *International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Plaintiffs may establish such intent either directly, by producing direct evidence of discrimination, or inferentially, by a showing of the following four elements: (1) plaintiffs belong to a protected class; (2) plaintiffs applied for and were qualified for employment; (3) despite their qualifications, plaintiffs were denied a favorable employment decision; and (4) persons outside of the protected class with substantially similar or lesser qualifications received the jobs. *McDonnell Douglas*, 411 U.S. at 802. Where plaintiffs allege a system-wide "pattern or practice" of discrimination, they must ultimately prove more than the mere occurrence of isolated or sporadic discriminatory acts; they must establish that racial discrimination was the defendant's "standard operating procedure." *Teamsters*, 431 U.S. at 336 & n.16. Upon the plaintiffs' satisfaction of their *prima facie* case, the burden then shifts to the defendant to show a legitimate,

nondiscriminatory business reason for acting as it did. If the defendant makes such a showing, the burden shifts back to the plaintiffs to show that the employer's stated reason is really a pretext for unlawful discrimination. *Watson*, 487 U.S. at 985-86.

Title VII proscribes "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In a so-called "disparate impact" case, the plaintiffs need not prove that the defendant intended to discriminate; instead, plaintiffs must prove that a particular employment practice, although neutral on its face, has caused a disproportionate adverse effect on a protected group. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657, 109 S. Ct. 2115, 2125 (1989); *United States v. City of Warren*, 138 F.3d 1083, 1091 (6th Cir. 1998); *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 907 (6th Cir. 1991). Once the plaintiffs have established the adverse effect, the burden shifts to the employer to produce evidence that the challenged practice is a business necessity. *Wards Cove*, 490 U.S. at 658-59. The plaintiffs can defeat a defendant's asserted business justification by showing either that the justification is a pretext, or that there exists an alternative practice with less racial impact that will achieve the same business end. *Id.* at 658.

Evidence of disparate impact usually focuses on statistical disparities rather than on specific incidents. *Watson*, 487 U.S. at 987. We have frequently stated that to prove a *prima facie* case of disparate impact, plaintiffs must (1) identify a specific employment practice; and (2) "show an adverse effect caused by the employment practice by offering 'statistical evidence of a kind or degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs. . . because of their membership in a

protected group. *Scales*, 925 F.2d at 908 (quoting *Watson*, 487 U.S. at 994); see also *City of Warren*, 138 F.3d at 1093.

We have also held, however, that "statistical evidence is not absolutely essential in proving a disparate impact case[; nonetheless,] there must be proof of disparity using the proper standards for comparison." *Gibson v. Frank*, 946 F.2d 1229, 1233 (6th Cir. 1991); see also *Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 926 (4th Cir. 1990) (statistics are "neither the exclusive nor a necessary means of proof" in disparate impact cases). The Supreme Court has made clear that the proper comparison in a disparate-impact case is between "the racial composition of [the at-issue jobs] and the racial composition of the qualified ...population in the relevant labor market." *Wards Cove*, 490 U.S. at 650 (alterations in original) (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977)).

A. Disparate Impact

The district court found that Plaintiffs established a *prima facie* case of discrimination under a disparate impact theory. Plaintiffs identified the members-only referral policy and the imposition of the working-at-the-calling requirement, in spite of its waiver in the PLA, as the employment practices causing the adverse effect. Plaintiffs asserted that in conjunction with these practices, two different types of "nepotism" operated to exclude blacks from jobs at Perry: (1) members who were already working at Perry could approach a contractor to get a relative or friend a union job; (2) members would approach Conrad to get relatives or friends employment.

Both sides submitted statistical analyses and expert testimony purporting to show that black membership in Local 496 was or was not proportionally low in a statistically significant way. While the experts agreed on the

appropriate technique, *i.e.*, standard deviation analysis, they disagreed upon how to define the relevant qualified labor force to which Local 496's membership must be compared.

The disagreement was primarily geographical. The experts agreed that the court should look at the numbers associated with both the General Occupational Category ("GOC") of "operators, fabricators and laborers," which included machine operators and tenders (except precision), fabricators, assemblers, inspectors and samplers, transportation occupations, material moving equipment operators, handlers, equipment cleaners, helpers, and laborers, and the Specific Occupational Category ("SOC") of "handlers, equipment cleaners, helpers, and laborers." They disagreed, however, on which persons falling under these categories should be included in the relevant labor force pool.

According to the 1980 Census, the residency figures in the four counties from which Local 496 drew 93.5%[8] of its members broke down as follows:

	General Labor Force		GOC		Socq	
	Black	Total	Black	Total	Black	Total
Lake	1,341	107,123	379	20,074	47	36,777
Ashtabula	1,179	45,989	420	12,150	149	2,143
Cuyahoga	144,573	710,029	34,972	126,295	7,821	30,219
Geauga	431	35,352	44	5,812	9	1,217
Total	147,524	898,493	35,815	164,331	8,026	37,256
%Black	16.42%		21.79%		21.54%	

As an initial matter, I note that the parties stipulated that "1762 persons employed in [the SOC] Category in Cuyahoga, Lake, Ashtabula and Geauga counties were black." Despite the stipulation, I think that this number is

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[8] The parties stipulated that as of April 1985, Local 496's members resided in the following counties: Lake — 290 (54%); Ashtabula — 125 (23.5%); Cuyahoga — 49 (9.2%); Geauga — 33 (6.2%); Other — 34 (6.4%).

obviously incorrect. Both experts purported to rely on statistics gathered from the 1980 Census. For the stipulated number to be accurate, the 1980 Census numbers for Cuyahoga County alone would be wrong, as would the resulting percentages. There is no support whatever in the record for this number, and the parties have not used it in their calculations. Thus, I too have ignored it. In addition, I note that the district court found that 23.4% of the SOC workforce in Cuyahoga, Lake, Ashtabula, and Geauga counties was black. That percentage figure does not appear in either party's calculations and does not find any support in the record. The court did, however, expressly claim to rely on the 1980 Census figures for this information. Therefore, I have used the number actually reported by the 1980 Census, *i.e.*, 21.54%, as the comparison figure adopted by the court.

Plaintiffs' expert, Dr. Pendleton, opined that the relevant labor force numbers should be drawn from the entire four-county area. His opinion was based on several factors: (1) 93.5% of Local 496's membership lived in these four counties; (2) the pay scale (approximately $14.00/hr for Perry laborers vs. an average of $6.66/hr for all jobs, including professional occupations) and the relatively low skill-level required to perform the job necessitated consideration of an expanded geographic area because people would be willing to travel farther; and (3) the extensive highway system between Cuyahoga and Lake counties increased thee distance which people would be willing to travel for work.[9] Dr. Pendleton testified that he

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[9] Dr. Pendleton testified that because of the road systems, he used the population figures for all of Cuyahoga county; he acknowledged, however, that the majority of Cuyahoga County's black population resided in the county's eastern half, and noted that the Perry Plant was within 20 miles from the east-side.

did not "weight" his figures according to commuter patterns/population proportionality because there was evidence of a "chilling effect," *i.e.*, when there has been either word-of-mouth recruiting or media coverage of past discrimination suits, both of which were present in this case, potential applicants remove themselves from the applicant pool and therefore skew the weights. Applying standard deviation analysis, Dr. Pendleton found that there was a statistically significant underrepresentation of blacks in Local 496's union membership. [10]

Defendant's expert, Dr. Martin, opined that the relevant labor force numbers should instead include only those individuals within the GOC or SOC who *presently work* in Lake County, regardless of residency. She based this opinion on the fact that Local 496's membership policy states that one must be working in Lake County at the time one applies for membership.[11] Using the applicant pool so-defined, Dr. Martin concluded that there was not a statistical underrepresentation of blacks in Local 496's membership.

Local 496 contends on appeal that the district court's finding of disparate impact cannot stand because the court

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[10] Between 1983 and 1985, the standard deviations for the SOC ranged from -9.77 to -10.36; the standard deviations for the GOC ranged from -9.88 to -10.46; the standard deviations for the total labor force ranged from -7.75 to -8.34. Any standard deviation number smaller than -2.00 (*e.g.*-2.5) constitutes a statistically significant underrepresentation, *i.e.*, one where the probability that the resulting numbers occurred by chance is extremely small. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977).

[11] Dr. Martin found that there were a total of 6,488 workers in the GOC from the four-county area that work in Lake County, and that 358, or 5 .5%, are black. There are 1,195 workers in the SOC from the four-county area who work in Lake County, and that 52, or 4.3 5%, are black. The overall workforce in Lake County is 1% black.

failed to identify properly the relevant labor market. *Wards Cove* makes clear that defining the relevant labor force is of paramount importance. 490 U.S. at 650-51. This determination, however, is a factual question, which we review only for clear error. See *EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 876-78 (7th Cir. 1994). We have previously described "clear error" as

> when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. The question is not whether the finding is the best or only conclusion that can be drawn from the evidence, or whether it is the one which the reviewing court would draw. Rather, the test is whether there is evidence in the record to support the lower court's finding, and whether its construction of that evidence is a reasonable one.

Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135, 140 (6th Cir. 1985).

The district court defined the relevant labor pool as follows:

> The relevant geographic area for purposes of comparison of the labor force with the membership of Local 496 is the four-county area from which the union draws the majority of its members, not only the county over which the local has jurisdiction....The four-county area is comprised of Lake, Ashtabula, Cuyahoga and Geauga counties.

The court then concluded:

> Local 496's membership and referral policies have resulted in a disproportionately small percentage of black union members as compared to the relevant labor force. Plaintiffs' statistical

> evidence shows a gross disparity between the percentage of blacks in the membership of Local 496 and the labor force of the four-county area, both in terms of total number of members during the relevant period and in terms of the new members taken in during this period.[12]
>
> The statistical disparities are sufficient to establish a *prima facie* case of discrimination under the disparate impact theory. In addition, other evidence of discriminatory treatment of class members supports the statistical evidence and together the evidence raises an inference of intentional discrimination.

After reviewing the evidence, I cannot say that the four-county area clearly is too broad a measurement. It is true that earlier in its factual findings, the court described Dr. Pendleton's definition of the relevant labor pool as "either the GOC or the SOC for the four-county area, rather than limited to the GOC or the SOC working in Lake County," and stated that "the basis of Dr. Pendleton's report is too broad." It thus appears that the court's statements concerning Dr. Pendleton's definition of the relevant market and its own definition of the relevant market are, on their faces, internally inconsistent. But looking at the opinion and the record as a whole, I conclude that they are not inconsistent in substance.[13]

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[12] The court also noted that between 1975 and 1979, Local 496's membership grew from approximately 100 to over 500 members (400+%), but that during that time, black membership increased only from 10 or 12 members to 18 members (less than 100%). Between April 1982 and February 1984, 42 new members were initiated into Local 496, none of whom was black. Between 1980 and 1985, the union accepted 54 new members, one of whom was black.

[13] While the court stated that the expert reports would not "control," it also acknowledged that it would consider the reports in concluding whether or not

The court explicitly rejected Dr. Martin's opinion that the relevant market should include only those who presently work in Lake County. I would agree that Dr. Martin's definition is entirely too narrow. In fact, it begs the question. As the district court observed:

> The weakness of Dr. Martin's argument or conclusion is that it does not take into consideration the fact that there may be discrimination in the hiring of the 6,488 employees in the GOC in Lake County. In other words, if in the hiring of all of the 6,488 employees in the GOC in Lake County there was in fact discrimination, then 5% blacks would not be a proper figure. Dr. Martin's conclusion assumes that there was no discrimination in the hiring of blacks in the GOC and, thus, her conclusion that the applicant pool is 5% black may or may not be valid.

See *Clark v. Chrysler Corp.*, 673 F.2d 921, 928 (7th Cir. 1982) (recognizing that the danger of "weighting" a relevant labor market calculation to reflect commuter patterns is that the geographic recruiting and employment practices may themselves be tainted by racial discrimination). In addition, I see no reason to assume that persons currently driving to work in Cuyahoga, Ashtabula, or Geauga Counties would not be willing to drive an equal time or distance to work in Lake County if desired jobs were available. Moreover, Dr. Martin's definition relies on the existence of the working-at-the-calling requirement. Under the PLA between Perry and Local 496, however, persons not yet working in Lake

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there was discrimination. During the trial, the court asked Dr. Pendleton questions indicating that it might be more appropriate to include only the east side of Cuyahoga County. As discussed below, this likely would result in a greater percentage of blacks in the relevant labor market.

County and persons not yet members of Local 496 can be referred to Perry and then admitted into membership. Thus, there is a factual basis for Dr. Martin's arbitrary limitation.

As listed above, Dr. Pendleton's testimony provided several reasons why the court should consider the population figures for all four counties, not the least of which was the relatively high wages that laborers at Perry earned. Compare *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 302 (7th Cir. 1991) (finding it necessary to consider commuting times because the jobs at issue paid low wages and provided little opportunity for advancement, and therefore were more likely to be filled by those living close by). I find these reasons persuasive and sufficient grounds for the court to include the entire four-county area in the relevant labor market.

Moreover, if it is appropriate to include in the relevant labor market the bordering Ashtabula and Geauga Counties, which Defendants do not contest, obviously at least some portion of the bordering Cuyahoga County must also be included. If, for proximity reasons, the court were to limit the portion of Cuyahoga County includable in the relevant labor market to something less than the entirety of Cuyahoga County, in all likelihood, black percentages would increase: the majority of Cuyahoga County's black population resides on the county's east side, *i.e.*, the side located closer to Lake County and the Perry plant. See, *e.g.*, *United States v. City of Parma*, 661 F.2d 562, 565-66 (6th Cir. 1981); *Banks v. Perk*, 341 F. Supp. 1175, 1178 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th

Cir. 1973). Thus the court's definition of the relevant labor market was not clearly erroneous.[14]

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[14] Local 496 asserts that instead of declaring "the four-county area" to be the relevant market, the court needed to identify further the interested and/or available applicants within those geographic boundaries. I disagree.

As an initial matter, I note that Local 496 spends a significant amount of time arguing that Dr. Pendleton's findings are "clearly erroneous" and/or legally insufficient, and that its expert's report was "superior." Contrary to Local 496's assertions, however, we review the court's findings, not the expert's opinion for clear error. Thus, I construe Local 496's arguments directed toward the district court's findings.

Citing *Chicago Miniature Lamp Works*, Local 496 argues that the court erroneously failed to factor commuting times into the relevant population determination. Chicago Miniature involved the hiring practices of a manufacturing company, located in an Hispanic and Asian neighborhood of Chicago, for entry-level positions requiring few skills and offering low pay that did not rise substantially over time. 947 F.2d at 294-95. The court stated: "The identification of a relevant labor market—the key issue in a class-based Title VII case—means not only identifying qualified potential applicants for the job at issue but also identifying interested potential applicants." *Id.* at 302 (emphasis in original). The court went on to hold that because low paying jobs are more likely to be filled by those living closer to the job (because the cost of a possible 1 1/2 hour commute cannot be justified), consideration of commuting time was especially important to the case before it. *Id.* The court also noted that the boundaries were arbitrarily drawn such that they did not include some areas just over 5 miles from the plant, but did include other areas as far as 20 miles away, *id.* at 302 n.8, and that the district court had failed to consider that the company's lack of an English-fluency requirement meant that it would receive a disproportionately large number of applications from non-English speaking persons. *Id.* at 302-03.

Chicago Miniature itself recognized that "a statistical model [in a discrimination case] need not be completely specified and some arguably relevant variables can be omitted in certain cases." *Id.* at 300. While it might have been helpful for the court to have explained its reasons for concluding that commuting time did not affect its relevant market definition, such explanation was not mandated in this case. In sharp contrast to the low-wage situation in *Chicago Miniature*, the record reflects that the jobs at Perry offered more than double the average wage available in other positions. Obviously, higher wages make jobs with longer commutes much more attractive. Moreover, under its

As the court found, whether one compares the relevant labor market population percentage (SOC--21 .54%; GOC--21 .79%) to the Local 496's total black membership numbers (2.88% 3.59%) or to the number of new black members admitted during 1982-84 (0%) or 1980-85 (approximately 2%), the disparity is statistically significant. Thus, despite the confusion as to numbers in the district court's opinion, I conclude that the court's finding ofa "gross disparity between the percentage ofblacks in the membership ofLocal 496 and the [relevant] labor force" was not clearly erroneous.

Local 496 further argues that the court failed properly to link the statistical disparity shown to the employment practices at issue. In addition to its statistical findings, however, the court cited considerable anecdotal evidence showing that these disparities were in fact caused by the members-only referral policy and the imposition of the working-at-the-calling rule. See *Gibson*, 946 F.2d at 1233 (a plaintiff may establish disparate impact on a racial minority without statistical evidence).

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own argument, Local 496 must acknowledge that including all of Cuyahoga County, as opposed to just the east side, works in its favor.

Local 496 also asserts that the court would need somehow to factor into the calculation the fact that for proximity reasons, part of the relevant population residing in Cuyahoga County might join the two other local laborers unions instead of joining Local 496 and working at Perry. (Local 310 has approximately 1100 members, and Local 860 has approximately 850 members.) Local 496 has failed to cite, and I cannot find, any support for the assertion that to satisfy *Wards Cove*, the relevant population figures must factor in a deduction for persons with other job prospects. At least in the context of this case, I reject this contention. See *Newark Branch, NAACP v. Town of Harrison*, 940 F.2d 792, 800 (3d Cir. 1991) (in assessing the district court's definition of the relevant labor market, noting: "Nothing in *Wards Cove* or other cases interpreting Title VII so much as suggests that available 'outside' job opportunities have any relevance whatever to the Title VII liability of a particular employer.").

The court's list of evidence included: the bargaining agreements; that employers, by custom, practice and agreement, could hire employees without any union oversight regarding discrimination; that the union admitted into membership anyone whom an employer hired; that in 1975, union membership was 100 with 10 black members, while in 1985, membership was 500 with 20 black members; that Perry was a "closed shop" arrangement; that in response to non-specified employer requests for workers, the union sent only members and never sent a non-member; that because of security, the average applicant could not gain access to Perry employers to be hired, while present union members, stewards, and foremen had direct access to such employers and could recommend their relatives and friends to employers for jobs, thereby rendering these relatives and friends "working in the calling"; and that approximately 30% of all union members, and 30% of those hired at Perry, were relatives of existing union members. The court also found that when a contractor specifically asked for a minority worker, instead of sending one of the black non-member plaintiffs, Conrad would instead contact Local 860 to obtain a referral. In addition, as the court noted, Conrad essentially admitted that he knew that employers relied on their white, but not black, superintendents and foremen to acquire additional workers.

Given the extreme statistical disparity between the number of blacks in the relevant labor pool and the number of new black members added to Local 496 between 1980 and 1985, the district court did not clearly err in finding that this disparity was caused by Local 496's members-only referral policy and the working-at-the-calling rule. Perry is a closed shop. Local 496 admittedly referred only members to Perry during the time period in question. To become a member of Local 496, one had to be working-at-the-calling in Lake County, but during the time in question, Perry was

the primary employer of laborers in all of Lake County. Also during the relevant period, all of the class members approached the union, requested membership and/or referrals to Perry, and were denied the same. It is therefore reasonable to conclude that the challenged practices caused the statistical disparity. Consequently, I agree that this court must affirm the district court's finding of disparate impact.[15]

B. Disparate Treatment.

The district court held that Plaintiffs proved a *prima facie* case of disparate treatment under the *McDonnell Douglas* test because: (1) plaintiffs are black; (2) they were available for referral by the union for job opportunities at Perry; (3) they did not receive referrals despite the fact that as nonmembers, they should have been referred according to the PLA; and (4) white non-members were referred to jobs to which plaintiffs had applied and were made members of Local 496. The court also summarily stated that the evidence demonstrated that Local 496 failed to inform minorities of its procedures for membership and job referrals.

On appeal, Local 496 devotes considerable energy to attempting to discredit the court's conclusions that Local 496 referred white, but not black, non-members to jobs at Perry and that Local 496 failed to inform minorities, but informed white persons, about membership and referral procedures. Plaintiffs respond by pointing to evidence in the record that could support the court's conclusions. While there is evidence in the record that, if credited, might

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[15] The district court proceeded to find that the union's asserted business justification was "clearly a pretext," and that in any event, there was a less restrictive alternative. On appeal, Local 496 has not asserted that this finding was in error, instead addressing only the requirements of Plaintiffs' prima facie case.

support the district court's findings, "[i]t has long been clear that when the court does not make findings which are sufficient to indicate the factual basis for its ultimate conclusion, the appropriate procedure is to vacate the judgment and remand for such findings." *Gonzales v. Galvin*, 151 F.3d 526, 532 (6th Cir. 1998) (emphasis omitted); *accord Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 63-64 (6th Cir. 1966) (there must be subsidiary findings to support the ultimate conclusions of the court).

In its findings of fact, without further explanation, the district court summarily stated that the working-at-the-calling requirement was waived "primarily" for white applicants. The only expansion on this conclusory finding is the court's statement in its conclusions of law that "the evidence in the record shows a pattern and policy of favoritism to friends and relatives." The court fails to provide us with a single clue as to who these "friends and relatives" allegedly receiving favorable treatment were, or how, when, or how often the working-at-the-calling rule was waived in this manner, or for that matter, whether such waivers were racially disproportionate. Similarly, while the court did find that in 1990, black class members were not informed of the monthly renotification requirement, the evidence of record reflects only one instance where the union failed to provide a copy of its referral policy. The court failed to make any other findings with respect to the union's failure to provide membership/referral policy information. Thus, I do not believe that we can assess whether Local 496 maintained a "pattern and practice" of refusing to inform minorities of membership and referral procedures. Moreover, the court has not provided us with any reasons to support its implicit conclusion that white persons were given such information. We simply do not know what evidence the court credited in reaching its

conclusion that Plaintiffs had been treated in a discriminatory manner.

> [A] district court's findings "should be comprehensive and relevant to the issues so as to provide a rational basis for the trial court's decision." In addition, the "findings should be explicit so as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the grounds on which the trial court reached its decision." *Sanders v. Dorris*, 873 F.2d 938, 942-43 (6th Cir. 1989) (district court's failure to discuss evidence supporting pattern and practice discrimination) (quoting *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 792 (6th Cir. 1984)) (internal citation omitted); see also *Gonzales*, 151 F.3d at 532. In short, due to the court's complete failure to make relevant factual findings, we cannot discern the grounds for its decision and we therefore have no basis upon which to determine whether its conclusions were clearly erroneous. Therefore, I would remand this issue to the district court to provide explicit factual findings explaining the basis for its conclusions.

III. Liability of LIUNA.

We review *de novo* a district court's conclusions of law, *Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989) (per curiam), but review its findings of fact only for clear error, *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 374 (6th Cir. 1984).

The National Maintenance Agreement, signed by LIUNA and effective at Perry in March 1985, provided in part:

> The employer agrees to hire men in any territory where work is being performed or is to be performed in accordance with the hiring procedure existing in the territory where the work is being performed or is performed; however, in the event the Local Union is unable to fill the request ofthe Employer for Employees within a forty-eight (48) hour period after such request for Employees, the Employer may employ workmen from any source.

The Agreement also contained a non-discrimination clause, which stated: "The Union and the Employer agree to abide by all Executive Orders and subsequent amendments thereto, regarding the Civil Rights Act of 1964, pertaining to nondiscrimination in employment, in every respect." The district court found that "[a]t all relevant times, the referral system was administered solely by Local 496; no International Union representative or agent has participated in its operation." The court also found that LIUNA "was aware of the discriminatory actions being take by the defendant[s] Local 496 and Floyd Conrad since May of 1983, but has continually refused to investigate charges of discrimination or take any action to correct this illegal conduct." It is undisputed, however, that no class member ever contacted LIUNA to register a discrimination complaint or to ask LIUNA to investigate his or her situation.

The district court concluded that LIUNA was liable under a principal-agent theory for the discriminatory actions of Local 496 because both before and after March 1985, LIUNA was "aware" of Local 496's actions regarding its refusal to make referrals to class members or to permit them to become union members, and because LIUNA "acquiesed" in those actions. The court also held that LIUNA had an affirmative duty under Title VII and § 1981

to oppose Local 496's discriminatory practices because for several years LIUNA had knowledge of the class members' charges of discrimination against Local 496 and of some resulting EEOC reasonable cause findings, and because LIUNA had signed the National Maintenance Agreement, which regulated labor relations at Perry.

A. Agency Theory

An international union may be liable for the discriminatory practices of an affiliated local if, in carrying out such practices, the local is acting as the international's agent. See *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1426-33 (D.C. Cir. 1988).[16]

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[16] The Supreme Court has previously observed that Congress clearly limited an international union's liability for acts of its affiliates to situations where a common-law agency relationship existed. See *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 216-18 (1979). Although *Carbon Fuel* involved the breach of a collective bargaining agreement by a local affiliate, the Court has also required the existence of an agency relationship to impose vicarious liability for discriminatory practices. See *General Bldg. Contractors Ass'n, Inc. v. United Eng'rs & Constructors*, 458 U.S. 375, 391-95 (1982) (discussing 42 U.S.C.A. § 1981 liability of trade associations and employers for local union's discriminatory practices).

In Berger, relying in part on *Carbon Fuel and General Building Contractors*, the D.C. Circuit explicitly held that common-law agency principles apply to unions and their internationals in the civil rights context. 843 F.2d at 1427-29. We think that Berger aptly ties together the existing case law and sets forth the correct approach.

I am aware that in *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), the Fifth Circuit stated that to hold an international union liable for the discrimination of a local affiliate, "[t]here must be a 'sufficient connection' between the labor organization and the discriminatory practice." *Id.* at 851. I agree with the D.C. Circuit, however, that Myers's actual application of the "sufficient connection" test does not support using in the area of Title VII and § 1981 an agency standard less stringent than that required by common-law agency principles. See *Berger*, 843 F.2d at 1428. In *Myers*, the international union was liable because of the "close relationship" with its local under which the international provided "advisors" who helped negotiate the discriminatory

Thus, to be liable under Title VII, an international must "participate in" or "authorize[], ratify[], or approve[]" ofthe particular condition about which the plaintiff complains. See id. at 1428-32.[17]

Contrary to the statements of the district court, mere "acquiescence" is not enough. To be similarly liable under § 1981, the plaintiff must also prove that the relationship between the international and the local is sufficient to impute discriminatory intent. Id. at 1430.

In the present case, the district court's findings and the parties' stipulations foreclose a finding that LIUNA "participated in" the discriminatory referral process. The closer question, of course, is whether, by signing the National Maintenance Agreement, and therein obligating contractors to "hire men in any territory where work is being performed or is to be performed in accordance with the hiring procedure existing in the territory where the work is being performed or is to be performed," when LIUNA knew or should have known of Local 496's discriminatory

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provision and required that the local submit its contract to the international for approval. 544 F.2d at 851. In other words, the international "participated in" and "approved of" the discriminatory practice. Moreover, *Myers* predated both *Carbon Fuel* and *General Building Contractors*; thus, to the extent it permitted a lesser connection between the international union and its affiliate, Myers has been superceded.

[17]In *Carbon Fuel*, the Court described the necessary agency relationship as requiring that the international union "instigated, supported, ratified, or encouraged" the local affiliate's conduct in question. 444 U.S. at 218. Somewhat differently, the Court in *General Building Contractors* stated: "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. 458 U.S. at 392 (quoting Restatement (Second) of Agency § 1 (1958)). The Court particularly emphasized the idea of "control," noting that the "power to oppose" union discrimination is not tantamount to a "right to control" the union. *Id.* at 393. The Berger court's characterization of agency adequately accounts for these various definitions.

practices, LIUNA "authorized, ratified, or approved" Local 496's referral practices.

In *General Building Contractors*, like in the present case, the plaintiffs charged that the union had engaged in a pattern and practice of racial discrimination by systematically denying access to union referral lists and by arbitrarily skewing referrals in favor of white workers. The Court held that the mere fact that trade associations and employers had delegated to the union the authority to select workers, and the union, in effectuating that delegation, intentionally discriminated or produced a discriminatory impact, alone was not enough to support an agency relationship. 458 U.S. at 391-94. Likewise, this court cannot find that merely securing in the National Maintenance Agreement a promise that the contractors will follow Local 496's hiring procedures, whatever they may be, without any concurrent control over those procedures, is sufficient to render LIUNA a principal responsible for Local 496's discriminatory actions. This is particularly so because the same agreement that Plaintiffs and the district court would read as reflecting LIUNA's acquiescence in the discriminatory referral procedures also contains an explicit requirement that the union not discriminate.

In *Berger*, the court found an agency relationship because, in addition to the international union's constitutional provisions providing the international with oversight authority over the local's membership practices (which alone would not be enough to find the agency relationship, 843 F.2d at 1431), the international had formally endorsed the establishment of the discriminatory practice in question and was actually involved in its implementation. *Id.* at 1430-32. In the cases cited by Plaintiffs, the provisions in question were themselves discriminatory and were explicitly negotiated by the

international. See, *e.g.*, *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 844, 847-48, 850-51 (5th Cir. 1977) (agency liability for "line seniority" provision in labor agreement either negotiated by the international or "advised" by international and requiring international's approval). In the present case, LIUNA was not involved in Local 496's 1973 agreement to refer both members and non-members to laborer positions at Perry. Plaintiffs have failed to present any evidence indicating that LIUNA supported or approved of Local 496's decision in fact not to comply with the terms of the PLA, or allegedly to make exceptions in their noncompliance for a number of white relatives/friends. LIUNA knew that charges of discrimination had been levied, but not that discrimination actually had occurred, and knew that Plaintiffs were seeking court intervention to resolve the matter. Therefore, on the record before us, where the district court found and the record reflects nothing more than mere "acquiescence," in my view we cannot find that Local 496 was acting as LIUNA's agent when it discriminated against Plaintiffs.

B. Affirmative Duty Theory.

The district court found that because LIUNA had notice of discrimination complaints against Local 496 and because it was a party to the National Maintenance Agreement, LIUNA had an affirmative duty to oppose Local 496's discriminatory conduct. In so holding, the district court relied upon *Kaplan v. International Alliance of Theatrical & Stage Employees*, 525 F.2d 1354 (9th Cir. 1975), wherein the Ninth Circuit held that under Title VII, "[b]y making and [tacitly] enforcing" a collective bargaining agreement that perpetuates past discriminatory effects, an international labor organizations has an affirmative duty to take corrective steps to prevent the perpetuation of such discrimination by their affiliates. *Id.* at 1360. Central to

Kaplan's holding, however, is that the international union actually negotiated on behalf of the local the agreement containing the discriminatory referral procedure. See *id.* at 1359-60. In contrast, LIUNA was not involved either in the negotiation of the 1973 PLA, or in Local 496's decision not to comply with the PLA's requirements. Moreover, in Kaplan, the provision perpetuating the discriminatory effects was part of the collective bargaining agreement itself. In the present case, Plaintiffs did not allege and the district court did not find that the PLA itself was discriminatory; it was the failure of Local 496 (by referring only members) and the employers (because of security at Perry) to properly implement the agreement that caused the discrimination.

Plaintiffs argue that requiring anything more than an international union's knowledge of discrimination claims against a local affiliate to create an affirmative duty would be "in direct conflict with the broad remedial purposes of Title VII and Section 1981, as well as LIUNA's duties under the National Maintenance Agreement." *In General Building Contractors Association*, however, the Supreme Court explicitly stated

> [T]he question is not whether the employers and associations are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is what duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United

> States." *We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them.*

458 U.S. at 396 (second emphasis added). Thus, at least under § 1981, in the absence of an agency relationship, an international union does not have an affirmative duty to ensure that its affiliates do not undertake discriminatory practices. See also *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 687-89 (1987) (Powell, concurring); [18] *cf. Phelan v. Local 305 of United Ass'n of Journeymen*, 973 F.2d 1050, 1061 (2d Cir. 1992) (in context of union democracy claim, citing *Carbon Fuel* for the proposition that: "An international union has no independent duty to intervene in the affairs of its local chapters, even where the international has knowledge of the local's unlawful acts."). Because of the close relationship between Title VII and § 1981, I conclude that the same standard applies in the Title VII context. See

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[18] In *Goodman*, the Supreme Court declined to reach the question of whether a trade union has an affirmative duty to oppose the racial discrimination of others (because the unions' practice of refusing to file any and all grievances presented by a black person on the ground that the employer would resent such grievances was an actionable violation in and of itself), but Justices Powell, Scalia, and O'Connor expressed their skepticism that such an affirmative duty could be imposed. 482 U.S. at 687-89.

Plaintiffs seek to distinguish the concurring opinion in Goodman, noting that it states that an affirmative duty to oppose "employer" discrimination would work a disruption in the basic policies of labor laws, whereas here, the discrimination is by a "local union," over which the international has a greater measure of control. I do not find this distinction to be of any import: federal law also protects the autonomy of local unions. *Cf.* 29 U.S.C.A. §§ 461-66 (West 1985 & Supp. 1998) (regulating the suspension of local union autonomy).

Berger, 843 F.2d at 1429 (noting that an international's liability for the actions of an affiliate must be based on something "more than the abstract and unbounded premise that the entities regulated by [Title VII and § 1981] have an 'affirmative duty' to end discrimination."). The non-discrimination clause of the National Maintenance Agreement likewise does not require anything greater.

Moreover, as a practical matter, holding LIUNA responsible for Local 496's actions, under the facts of this case, makes little sense. In finding an affirmative duty, the district court relied in part on the fact that in March 1985, LIUNA signed the National Maintenance Agreement. Before 1985, LIUNA was not a party to any Perry agreement. After May 1985, no class member even applied for union membership until 1990. During that period, no class member filed an EEOC grievance claiming additional discrimination. In addition, no class member ever requested that LIUNA investigate the charges of discrimination. As far as LIUNA was aware, the institution of the October 1987 referral policy, which the court acknowledged appeared to be neutral on its face, corrected any discrimination problems that had appeared in the past.

For the foregoing reasons, I would hold that the district court erred in finding that LIUNA had an affirmative duty to oppose Local 496's discriminatory practices.[19]

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[19]Although not acknowledged by the district court, the evidence shows that in the 1984-85 time period, LIUNA, through Regional Representative Tom Arconti, did make some effort to investigate discrimination claims.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C84-3916

DAVINE ALEXANDER, JAMES CARSON, ARTHUR LEE COOK, DWAYNE ALLEN CURRY, EVERETT L. HOWARD, ART TOMBLIN, DONALD WAYTES, RICHARD A. LILLY, EDWARD TURNER II, PERCY POUEWELLS, LEE N. COFFEE, ISIAH JOHNSON, JR., JIMMIE RICE, RONALD COLVIN ,

Plaintiffs,

v.

LOCAL 496, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, FLOYD B. CONRAD, LABORER'S INTERNATIONAL UNION OF NORTH AMERICA,

Defendants.

December 10, 1991, Issued

OPINION

Judge Alvin I. Krenzler

Memorandum of opinion, findings of fact and conclusions of law regarding defendant's liability.

INTRODUCTION

This is a civil rights action whereby the plaintiff class members contend that they were denied union membership and employment opportunities by the defendant unions because of their race.

This Court certified the present case as a class action with the plaintiff class being all black persons who applied for or could have applied for a position at the Perry Nuclear Plant.

Plaintiffs have alleged that the policies and practices of Local 496 of the Laborers International Union of North America ("Local 496") and its Business Manager, Floyd Conrad, regarding admittance of blacks to Local 496 and referral of blacks to jobs as laborers violates Title VII, *42 U.S.C.* §~s~ *2000e*, et seq., and *42 U.S.C.* § *1981*.

The Laborers International Union of North America ("International Union") was also brought into this case as a party defendant. An international union can be held liable for the discriminatory actions of an affiliated local union either on an agency relationship with the local or on the basis that it has an affirmative duty to oppose discrimination by one of its locals.

Plaintiffs have attempted to prove their case under two separate theories. The first theory is that the union's policies have a disparate impact upon blacks and the second is that the union is guilty of a pattern or practice of disparate treatment of blacks.

The plaintiffs have contended that the union has selected applicants for membership in a racial pattern significantly different from the general pool of applicants.

The defendants have contended that the methodology for admitting persons into the union is based on business

purpose. The plaintiffs contend that this alleged business purpose is a pretext.

The plaintiffs attempted to make their prima facie case of discrimination by statistics and other evidence. They attempted to show a disparity by comparing the percentage of defendants' members who are members of the class with the percentage of the general population in the appropriate geographic area representing members of the class.

Union policies and procedures that may be neutral on their face but which produce discrimination are unlawful.

The plaintiffs contend that a requirement for applicants for union membership is they must first be "in the calling," which means that they must have a job before they can be admitted to the union. We are dealing in this case only with job applicants and applications for union membership in regard to the Perry Nuclear Plant.

The plaintiffs contend that inasmuch as the Perry Nuclear Plant is a secured area and applicants for jobs with contractors cannot get into the area, it is virtually impossible for applicants to make application and get jobs unless they have some relationship with either the employer or the union representatives. The plaintiffs contend that because the union officers and their friends and relatives are working for the contractors in the Perry Nuclear Plant, they have access and thus recommend their friends for employment and thus membership into the union, and that this methodology discriminates in fact against the minority applicants. The plaintiffs contend that inasmuch as approximately 30% of the union members are all related and friends and white that this in and of itself shows discrimination in fact and a violation of Title VII.

Plaintiffs contend that the entire methodology employed by the Local, the International and the employers, results in

discrimination. It is noted that the employers are not parties to this case.

Local 496 contends that all it does is admit applicants into membership after they have a job and all of the hiring is done by employers and therefore the union has not discriminated and cannot be charged with discrimination.

The International Union contends that it has not discriminated and has no obligation whatsoever to monitor or control the local union. The International Union has a requirement that in order to be a member the applicant must be "working at the calling" of labor at the time he or she seeks to enter the union. The International Union contends that it does not discriminate in fact and cannot be held liable even if Local 496 has discriminated.

In determining whether there is discrimination, statistics were used in this case and one of the concerns is the geographical area involved. If Cuyahoga County were included that would make the applicant pool of qualified workers substantially higher than if Cuyahoga County were not included.

The plaintiffs have alleged and introduced evidence that the defendant Local 496 and the International Union have discriminated against blacks by their rules and regulations and by their practices and methods in the hiring process and the admission of members. They contend that in 1975 there were 100 members in the union and that 10 were black, and that in 1988, there were approximately 500 members in the union and less than 20 were black.

While the methodology used by employers and the union in hiring employees and admitting them into the union may appear to be race neutral on its face, through a series of connected and disconnected processes they result in discrimination. There is much fingerpointing and blaming

each other among the *employers, the Local Union,* the International Union, and the plaintiff class employees.

The plaintiffs allege that the total picture results in discrimination and that it is not proper to take the isolated events and not connect them together into a series of events that reflect discrimination.

The defendant Local 496 takes the position that is almost an innocent bystander, just one link in the flow of applicants and jobholders.

Local 496 contends and submits evidence that the International charter or constitution requires that one must be "in the calling" before he or she can be admitted into the union. Local 496 contends that it is not a hiring hall and that all employees are not hired by the union and then referred to the employer. The agreement between the employers and the union is that the employer can do its own hiring and whoever they hire will be automatically admitted into the union. Further, the employer can request a certain number of named people and the union will automatically admit them into membership. While the employers are not parties to the case, the testimony of some employers is that they recognized they could only hire union members and that whenever they wanted someone, they would hire them and they would be admitted into the union. If they were not union members, they would send the person they wanted to hire to the union hall to be admitted into membership. This had to be done within seven days of employment. The union automatically admitted such people into membership. While, as stated above, the employers are not parties to the case, they stated that they hired whoever applied for a job if and when there was a vacancy. They also contend that if they wanted to get an employee from the union, they either asked for a specified person, sent the person they hired to the union hall, or asked the union for a certain number of

people. They did not specify black or white and they took whomever the union sent them. The employers contend that if any applicant or potential applicant believed that there was discrimination by the employer, such people should have filed a grievance or a discrimination charge against the employer.

Local 496's Business Manager, Floyd Conrad, who is the key player in this case, contends that he was only a referral agent. Whenever an employer hired someone, he accepted him into the union. If the employer referred someone by name, he would admit them into the union. Whenever an employer asked for a certain number of unnamed employees, he would send only his unemployed union members. He would never send an unemployed non-union person. He has a very simplistic story in that he was there to look out for the existing members. There was a high rate of unemployment and he did not want to admit into membership anyone who was not in the calling as required by the International Union. However, whoever an employer hired, he would admit into membership. He, in effect, contends that he is merely a conduit for the flow of applicants, hired personnel, and membership. In other words, he would just admit into membership whoever had a job or was hired by an employer and, on occasion when requested, he would send people to employers, but only unemployed union members.

The International Union takes the position that it is only an international union and Local 496 is not its employee, agent, or representative in any manner. Local 496 is totally independent of it and the International Union cannot control the daily affairs of Local 496. Further, the International Union argues that it was not aware of all of the alleged discrimination charges and activities going on at the local level.

Everyone, including the employers and Local 496, contends that they did not discriminate.

While this scenario may appear to be race neutral, when all of the component parts are put together and looked at as one picture or a mosaic, the results are clearly discriminatory. This is the classical case of a facially neutral program that resulted in discrimination in fact.

The good part about this case is that there is not much dispute about the history and the operative facts about what happened. It is the conclusions to be drawn from the evidence or the inferences that come from the evidence that make it difficult for a court to decide whether or not there was discrimination.

First, there is the statisticians' dispute which results in a different conclusion based on the beginning point of what constitutes the applicant pool. Once this determination is made by the expert, the conclusion is foregone. With a broader applicant pool such as proposed by plaintiffs' expert, Dr. Pendleton, there clearly was discrimination because of the disparate impact. Taking the more narrow, restricted applicant pool of defendants' expert, Dr. Martin, there was not a disparate impact and, thus, not discrimination.

The law in regard to discrimination is now clear and well settled. The plaintiff class has the burden of proving discrimination. The plaintiffs must first demonstrate a prima facie case. This may be done by direct evidence and the inferences coming therefrom and/or statistical evidence which would indicate a disparate impact. The defendants then have the burden of going forward with demonstrating a business purpose to explain the disparate impact. The plaintiffs would then go forward to demonstrate that the

business purpose was, in fact, a pretext to cover up the discrimination.

In this case, the plaintiffs made a prima facie case by the statistics, direct evidence, and inferences coming from that evidence which clearly demonstrated a disparate impact. The defendant Local 496 had a very simple story which I have repeated several times above and that its business purpose was to protect its unemployed members and not add excessive members to the union rolls which would create discontent. Local 496's goal was to have 100 percent employment of its union members and by just admitting people into membership without jobs would create more problems than it would solve. The union contends that it only referred union members to employers when requested and also admitted into membership any person who was hired by an employer. That is all that it did and that that was its business purpose. It was a simple, straightforward situation and the union did not discriminate.

Obviously, if the employers only hired white persons and the union only admitted into membership people who had jobs, the result was that a high percentage of the union membership would be white. Further, if the union only referred upon request union members, then they would be referring whites because whites were only hired in the first place and those were the only people admitted into membership in the union. So it was a vicious circle that perpetuated the hiring and rehiring of whites and limited the number of blacks who got hired and thus admitted into the union. While it appeared to be a facially neutral operation and nondiscriminatory, one would have to be an ostrich with its head in the sand not to recognize that the result of all of this was discrimination and one knew, or should have known, that this facially neutral process and operation clearly resulted in discriminatory impact and, consequently,

discrimination in fact against black persons who wanted to get jobs and join the union.

It is clear that Local 496 was hiding behind the hiring practices of the employers. The thing that this Court does not understand is why there were not a large number of discrimination cases filed against the employers if they, in fact, were hiring whites in a disproportionate number or percentage in relationship to the applicant pool for such jobs.

The overall process, taking into consideration all of the factors, was clearly a pretext.

INTERNATIONAL UNION

The International Union takes a simplistic view in that it just, in effect, licenses the local and the local is independent and the International Union has no duty or obligation in regard to monitoring or checking as to whether Local 496 discriminated.

The evidence is clear that the International Union knew, or should have known, about all of the activities going on at Local 496 in regard to the hiring practices and the overall picture. Further, there were sufficient complaints brought to the attention of the International Union in the form of direct complaints by some of the minorities and also the communications between Mr. Conrad and the International Union's field representative.

Under these circumstances, the International Union cannot be a neutral, passive bystander and attempt to avoid liability.

The International Union had a duty and an obligation when it knew or should have known about discriminatory practices to at least investigate and become involved in the

system and process and alert the local as to the overall program and that it may result in discrimination charge and successful litigation.

Thus, the International Union was as much a part of the program as Local 496 and is as culpable and liable for the discrimination that this Court found to exist in the hiring of blacks and in the admission of blacks into the union.

FINDINGS OF FACT

1. Local 496 and the International Union are labor organizations as defined in *42 U.S.C. § 2000e(d), (e).*

2. Pursuant to an agreement with the Cleveland Electric Illuminating Company, Local 496 operated the exclusive referral hiring hall for laborers at the Perry Nuclear Power Plant. According to that agreement, the local was to refer both members and non-members of the union for laborers' jobs.

3. Local 496 was the exclusive referral source for laborers at the Perry Nuclear Power Plant. Local 496 had an agreement with Local 860 of Cleveland, with which Local 496 shared jurisdiction over the Perry Plant, to refer Local 860 members to laborer jobs at Perry.

4. Over 30% of the union members have relatives and/or friends who are also union members. One of the prime ways of acquiring membership in the union and/or a job referral is through the intervention of a relative or friend. During the relevant period the Perry Nuclear Power Plant was the primary employer of laborers in Lake County. Because of security at the plant, it was not possible for prospective employees to solicit contractors at the plant for positions as laborers.

5. Minority applicants for jobs did not have access to the employers at the Perry Nuclear Power Plant for hiring purposes because it was a secured area.

Local 496 Membership & Referral Practices Generally

6. Floyd Conrad has been the Business Manager for Local 496 since 1974. The duties of the Business Manager include the following: (a) taking care of complaints which arise from the members; (b) finding employment for the members; (c) investigating new jobs to determine when they will begin and how many laborers will be needed; (d) making sure that all union contractors are paying union scale wage; (e) making referrals for laborer positions at the Perry Nuclear Power Plant.

Floyd Conrad testified on direct examination, cross-examination and in response to the Court's questions, in a very low-keyed, simple, straightforward manner about the various procedures. He acknowledged that all of the various collective bargaining agreements incorporated the President's Executive Order and the anti-discrimination laws passed by the Congress.

He stated, in a straightforward manner, that as Secretary/Treasurer and, in effect, Chief Operating Officer of Local 496, his job was to protect his members and to have as many of them employed as he could.

He acknowledged that the International Union requires that one be "working in the trade" before one can join the union. He stated that whenever an employer advised him that the employer was hiring someone, the hiree would automatically get in the union. He testified that whenever an employer asked the union for an unspecified person to fill a position, he would then send someone from his unemployed members list. He never sent a non-member, whether black

or white, to fill a job at the request of an employer. His stated reason was that his job was to protect union members and that if he sent unemployed non-union members, his union members would become angry with him.

He stated that if an employer was discriminating in fact against blacks, then the blacks should file a grievance. He stated that he did not believe that he or his union had any obligation to monitor or police discrimination by employers. He stated that his job was simply that of referring unemployed members for jobs at the request of employers and that his job was not to recommend for employment unemployed non-union members.

He conceded that the fact that the Perry Nuclear Power Plant was a secured area and that access to the employers was more readily available to the people working on the site than it was for people off the site. However, he stated that the blacks working at the Perry Nuclear Power Plant had equal access to the employers as the whites working at the Plant and that they could have recommended their friends and relatives, the same as the whites and that it was up to the employer as to whom they wanted to hire.

While all of the foregoing individually may be innocuous or neutral, when taken cumulatively and as a whole they result in sufficient evidence by which a trier of the fact could find discrimination by the Local and the International Union.

Local 496 Membership Practices

7. The Constitution and By-Laws governing Local 496 expressly provide that Local 496 can only induct into membership individuals working at the calling as laborers. Local 496 has territorial jurisdiction over the building construction work in Lake County, Ohio. The work force in

Lake County, Ohio, is 1 .3% black. The average membership in Local 496 over the period relevant to this lawsuit is in excess of 3% black.

8. The rule which requires a prospective new member to be working in the calling in order to be initiated as a member is not applied uniformly. The rule was regularly waived during the period of the union's rapid growth, primarily for white applicants.

9. A standard initiation fee is charged by Local 496. This initiation fee is applied to all members regardless of race.

10. The procedure for hiring and admission into Local 496 was neutral on its face.

11. Local 496 initially refused and continued up to January 22, 1990, to refuse black persons membership in the union based on the provision in the International Union's Uniform Local Union Constitution, Article III, Section 1(a), which states: "In order to be eligible for membership a person must be working at the calling within the territory of the Local Union in which the individual applies for membership." This provision is incorporated in the International Union's own Constitution at Article XVI, Section 1. This provision has been used by Local 496 to deny membership to blacks and to deter blacks from applying for membership in order to keep Local 496 mainly an all white union.

12. Black applicants for membership in Local 496 were met with a reluctant or even, at times, hostile attitude of the Business Manager.

13. All of the named plaintiffs approached the union to apply for membership. Not one was accepted.

14. The experience of Donald Robinson, one of the few black union members, reveals a discriminatory animus of the Business Manager against the admission of blacks into Local 496.

15. On a few occasions in 1982, Davine Alexander appeared at Local 496's union hall and requested membership in the union. Ms. Alexander was advised that she could not be inducted into membership unless she was working at the calling.

16. Ms. Alexander has never worked as a laborer for a contractor having a collective bargaining agreement with Local 496.

17. On May 4, 1984, Ms. Alexander filed a charge of discrimination against Local 496 with the EEOC. Ms. Alexander's charge of discrimination against Local 496 related to her claim that she was improperly denied membership in Local 496.

18. The union contends that it cannot automatically allow anyone who applies for membership to become a member without having a job because there were too many unemployed members. If this were done it would create discontent among the union members and create problems for the union leaders and officers. This is a somewhat inconsistent argument because if the union took everyone into membership who got hired, and contractors hired a lot of non-union members who later became members of the union, it would produce the same result; to-wit, a large number of unemployed union members. This, too, would create discontent. The credibility of the union's argument is questionable.

Statistics Regarding Local 496 Membership and the Labor Force

19. During 1983 and 1984 black membership for Local 496 varied from 2.8% to 3.59%. The following table shows the total number of members and number of black members of Local 496 during the years 1983 and 1984:

DATE	TOTAL	BLACK MEMBERSHIP
1/83	501	18
2/83	509	17
3/83	509	17
4/83	508	17
5/83	507	17
6/83	509	17
7/83	514	17
8/83	511	16
9/83	509	16
10/83	510	16
11/83	514	16
12/83	513	16
1/84	516	16
2/84	519	16
3/84	516	15
4/84	521	15
5/84	523	18
6/84	520	18
7/84	536	18
8/84	545	18
9/84	545	18
10/84	545	18
11/84	545	18
12/84	544	18

20. Between 1980 and 1985 the number of members of Local 496 has ranged from 509 to 545 members and the number of black members has ranged from 16 to 20. The percentage of the membership that was black has ranged from 2.88% to 3.59%.

21. As of April, 1985, of the 531 active members of Local 496, 93.5% of the members lived in one of four counties: Lake, Ashtabula, Cuyahoga and Geauga. The distribution of the residency of the members is as follows:

Lake	290	54.6%
Ashtabula	125	23.5%
Cuyahoga	49	9.2%
Geauga	33	6.2%
Others	34	6.4%

22. The 1980 Census indicates that blacks comprise 18.4% of the population of the counties of Lake, Ashtabula, Cuyahoga and Geauga.

23. According to the 1980 Census, the labor force in Cuyahoga, Lake, Ashtabula and Geauga counties contained 147,524 blacks out of 898,493 persons. Thus, blacks comprised 16.4% of the labor force in the four-county area.

24. The 1980 Census also reports that 23.4% of the portion of the workforce in the category of handlers, equipment cleaners, helpers and laborers, in Cuyahoga, Lake, Ashtabula and Geauga counties were black.

25. Between 1975 and 1979, Local 496's membership grew from approximately 100 to over 500, an increase of more than 500%. Black membership increased from 10 or 12 members to 18 members during that time.

26. Between April 1982 and February 1984, 42 new members were initiated into Local 496. None of those new members was black.

27. Between 1980 to 1985, the union accepted 54 new members of whom one was black.

Expert Analysis of Statistics

28. EXPERTS

As is the case with many discrimination cases brought under Title VII, expert witnesses in the form of statisticians are brought in to demonstrate that based on a statistical analysis a defendant has discriminated. Normally, each side brings in an expert who reaches opposite conclusions.

In the present case, the plaintiffs' expert is Dr. Brian F. Pendleton and the defendants' expert is Dr. Beth Martin. The unusual thing about these two experts is that their methodology was similar except in one major respect. This difference had to do with the beginning point or the so-called "applicant pool."

29. DR. PENDLETON

Plaintiffs produced an expert regarding statistics, Dr. Brian Pendleton. Dr. Pendleton used a basic standard deviation analysis on the four (4) county population figures. Based upon his analysis of these gross population figures, Dr. Pendleton concluded that there was a statistically significant underrepresentation of blacks within the membership of Local 496. In other words Dr. Pendleton, through his analysis, found that there were more than two (2) standard deviations with regard to the actual number of blacks in Local 596 as opposed to the expected number of blacks in Local 496 based on the four (4) county population data.

Dr. Pendleton stated that since approximately 93.5% of the union membership is drawn from the four-county area of

Lake, Ashtabula, Cuyahoga and Geauga, this should be referred to as the applicant pool.

Next, Dr. Pendleton stated that it was appropriate to consider three separate levels of occupations. First, there was the general labor force in the broadest sense. The second occupational level is drawn from the general occupational category ("GOC") of operators, fabricators, and laborers. This general group included relatively unskilled positions like machine operators and tenders, fabricators, assemblers, etc. The third occupational level he used was the specific occupational category ("SOC") of handlers, equipment cleaners, helpers and laborers. This occupational level is very specific and includes the members of Local 496.

All of the county and occupational data are drawn from the 1980 census.

Dr. Pendleton, in effect, states that since 93-1/2% of all of the union members come from the four counties, namely, Lake, Geauga, Ashtabula, and Cuyahoga County, these should be considered primarily. He considered the general labor force, the GOC and the SOC, and determined the percentage of blacks in those counties and in those categories and then compared it to the percentage of blacks belonging to the union. The percentage of blacks in the union, Local 496, was substantially less than the percentage of blacks in the GOC and the SOC in the relevant counties.

This is a very broad categorization and, in substance, it includes, in computing the percentages, to total of blacks and whites in the GOC and the SOC in those counties and compares it with the black/white ratio of membership in Local 496.

Based on his calculations, he concluded that blacks are consistently underrepresented in the union membership in a statistically significant manner.

Dr. Pendleton took a much broader approach than Dr. Martin.

30. DR. MARTIN

Dr. Martin criticized Dr. Pendleton's method in that he used the entire labor pool of the four-county area (Lake, Geauga, Ashtabula, and Cuyahoga) as the applicant pool for his analysis.

Dr. Martin, in substance, states that since Local 496 membership policy states that one must be working in Lake County at the time one applies for membership, this must be taken into consideration and that a more finely tuned applicant pool should be used, rather than the one selected by Dr. Pendleton. She agreed with Dr. Pendleton that the GOC and the SOC should be the basis of the analysis. However, she stated that the general labor force would be an inappropriate applicant pool.

In sum, she states that the appropriate labor pool consists of the individuals within the GOC and the SOC who work in Lake County, regardless of county residency. Her reason is that those are the only individuals who are eligible for membership in Local 496.

She further states that since approximately 93.5% of the union membership is drawn from the four-county area, that would be the geographical area from which the applicant pool is derived. She used the 1980 census provided by the Northern Ohio Data Information Service ("NODIS"). It was determined that there are a total of 6,488 workers in the GOC from the four-county area who work in Lake County, and that 358 or 5.5% are black. There are 1,195 workers in the SOC from the four-county area who work in Lake

County. There are 52 or 4.35% who are black. The overall work force in Lake County is 1% black. She thus concludes that the GOC is 5.5% black and 94.5% white, and the SOC is 4.35% black and 95.65% white.

Dr. Martin then goes on and uses the same methodology as Dr. Pendleton, but she ends up with a result that concludes that there is no discrimination. She then simply states that since the union membership is 5% white and the percentage of blacks in the GOC now working in Lake County is 5% blacks, there is no discrimination.

31. COMPARISON OF DR. PENDLETON'S & DR. MARTIN'S REPORTS

Obviously, the difference in the results is the applicant labor pool. In effect, Dr. Pendleton uses a broader base, using the entire labor force in the four-county area for overall labor pool, GOC and SOC. This results in a higher percentage of blacks and a lower percentage of whites.

On the other hand, Dr. Martin took the NODIS figures as a beginning point of 6,488 workers in Lake County in the GOC. She then took the percentages of blacks and whites who are in this category and concludes that there is no discrimination.

Dr. Pendleton, in effect, states that the applicant pool is much broader than those working at the present time in Lake County. He believes that the applicant pool should be either the GOC or the SOC for the four-county area, rather than limited to the GOC or the SOC working in Lake County. He claims that the premise upon which Dr. Martin starts, that the applicant pool should be the GOC or the SOC working in Lake County, is not proper because it is too limiting.

The weakness of Dr. Martin's argument or conclusion is that it does not take into consideration the fact that there

may be discrimination in the hiring of the 6,488 employees in the GOC in Lake County. In other words, if in the hiring of all of the 6,488 employees in the GOC in Lake County there was in fact discrimination, then 5% blacks would not be a proper figure. Dr. Martin's conclusion assumes that there was no discrimination in the hiring of blacks in the GOC and, thus, her conclusion that the applicant pool is 5% black may or may not be valid.

This Court believes that the limitations of Dr. Martin's report are too many and that the basis of Dr. Pendleton's report is too broad. In other words, Dr. Martin's basis is too narrow and Dr. Pendleton's is too broad. For this Court to conclude that there is or there is not discrimination based on the conclusions of Dr. Pendleton and Dr. Martin would not be proper. While the Court will take into consideration Dr. Pendleton's and Dr. Martin's reports and conclusions, they will not control. In other words, this Court does not feel that it is proper to pick and choose between the two reports and then draw a conclusion as to whether there was or was not discrimination based on these reports.

There is much better evidence, based on the testimony and exhibits in this case, upon which this Court can base its conclusions as to whether there was or was not discrimination.

There is a cumulative combination of facts and circumstances upon which this Court can conclude whether there was or was not discrimination. These include, and are not limited to, the following:

a. The various collective bargaining agreements between the unions, employers, and employers' associations.

b. The International Union's requirement that one must be "working in the calling" before he or she may become a member of the union.

c. By custom and practice and by various agreements, the employers may hire employees as they choose, without any active control by the union or overseeing by the union in regard to discrimination.

d. The union will admit into membership any person who has a job which means that he is in the calling.

e. The union requires that anyone who gets a job and is in the calling and is not a union member must join the union within seven days of getting the job.

f. In 1975, the union membership was 100 with 10 being black. In 1985, the union membership was 500 with approximately 20 being black. Between 1980 and 1985, 54 new members were initiated into the union or admitted into the union and one was black and all of the others were white.

g. This case is limited to hiring of laborers at the Perry Nuclear Power Plant. The hiring of laborers at the Perry Nuclear Power Plant was based on a collective bargaining agreement. This, in effect, was a closed shop arrangement.

h. The union only sends persons to an employer at the Perry Nuclear Power Plant on request by the employer. The employer may request a named individual or just ask for a certain number of persons. The union kept lists of unemployed union members, as well as unemployed non-members.

i. The union only sent unemployed members in response to requests for unspecified workers.

j. The union never sent a non-union member in response to a request for an employee.

k. Because the Perry Nuclear Power Plant was a secured area it was virtually impossible for the average applicant for a job to gain access to employers to be hired. Present union members, stewards and foremen working at the Perry Nuclear Power Plant had direct access to all of the employers and contractors working at the Perry Nuclear Power Plant, and they were able to recommend their friends and relatives for jobs. They were then in the calling and were able to become members of the union.

l. Approximately 50% of all of the union members are relatives and friends of other union members.

m. As a result of the fact that the Perry Nuclear Power Plant was a secured area and the present union members, foremen and stewards had access to the employers, a high percentage (30%) of the union members who were hired are relatives of existing union members.

Local 496 Referral Practices

32. The Business Manager and Field Representative frequently make calls to and receive calls from the contractors and the foremen to assist union members in obtaining employment, and to assist contractors in obtaining employees. All General Foremen and Foremen working for contractors or sub-contractors pursuant to a labor agreement with Local 496 were members of that local.

33. Article VI, section 7 of the June 1, 1988 – April 30, 1990 Local 496 -- Lake County Contractors Association Agreement provides "members of Local 496 may solicit their own jobs and Contractors may hire members of Local 496 directly. However, it is recognized within the construction industry that the Union affords a prime source of qualified workers."

34. In the collective bargaining agreement between the union and the contractors, the contractors can hire who they please but they must be a member of the union.

35. The prevalent practice in Lake County was for contractors to hire as laborers only members of Local 496. Blacks who were not members of the local would therefore not be hired.

36. If a member of the union gets hired they notify the union so it is entered on the records for dues-paying purposes.

37. When a contractor hires a non-union member he must become a member of the union within seven days or he cannot keep his job.

38. Mr. Rudy Bracale, the Field Representative for Local 496, testified that the union never sent people to a contractor for a job. However, if a contractor or employer wanted someone special they would request them.

39. When contractors would request from Local 496 that a black laborer be referred, the Business Manager of Local 496 often would call Local 860 of Cleveland to send a black laborer rather than refer a class member.

40. The language in Article VI, section 7 of the 1988-90 Lake County Contractors Association Agreement has consistently been interpreted to allow contractors to hire non-members as well as members who solicit their own jobs.

41. On occasion, contractors who have collective bargaining agreements with Local 496 have specifically requested that Local 496 refer individuals to them for jobs. On some occasions these specifically requested individuals were not members of Local 496 at the time of the contractor's request. By policy and practice, Local 496

honors these contractor requests regardless of the fact that the individual requested was not a member of Local 496.

42. In the event a non-member is referred because of a specific request by a contractor having a collective bargaining agreement with Local 496, that individual is inducted into membership and required to pay the needed initiation fee within seven days of commencing employment with the requesting contractor.

43. Any non-member of Local 496 who secures, through his or her own solicitation, a job with a contractor having a collective bargaining agreement with Local 496 is, within seven days after securing such job, inducted into membership in Local 496.

44. The union automatically admitted into membership anyone hired by a contractor or employer at the Perry Nuclear Power Plant. The union did not police the hiring practices of the employer as to whether or not there was discrimination in the hiring practices.

45. This Court did not find any express overt agreement between the contractors and the union in regard to hiring practices.

46. Prior to June 1, 1988, and at all relevant times (a) members of Local 496 as well as non-members could solicit their own jobs and employers with a collective bargaining relationship with Local 496 could hire such individuals directly; and (b) non-members who were so hired were required to become members of Local 496 within seven days pursuant to the then applicable collective bargaining agreement.

Local 496 Referral Procedures

47. The Business Manager has total authority to refer anyone to laborer positions. During the relevant period, Mr. Conrad referred union members to jobs and refused to refer persons such as the plaintiffs, who were not union members. Local 496 never referred a non-member to a job at the Perry Nuclear Power Plant. For the period relevant to this lawsuit, blacks have been referred to well in excess of 1.3% of the job opportunities presented to Local 496 by contractors within its jurisdiction. The job referral system operated by Local 496 is non-exclusive. Any person, member or non-member, has the right to solicit his or her own job opportunities as a laborer within the territorial jurisdiction of Local 496.

48. The mechanics of maintaining a list for out-of-work members and non-members of Local 496 changed several times. There was one system in the period 1980-1985. There was another system in 1985 and a third system after 1987.

49. Prior to 1985, a list of unemployed members was kept on a secretary's spiral-bound stenographic pad. This list was labeled "Unemployed Members List. " This was kept on a daily basis. When a union member became unemployed, he or she showed up at the union hall and signed the list. This book was kept at the counter.

50. The front of the book was used exclusively for unemployed union members. In the back of the book there was a separate sheet for non-members. This listed the non-members according to race, whether he or she was black or white.

51. Some black applicants for membership in Local 496 and for job referrals were required to sign a book which identified them by race. These applicants were not made members or referred to any laborer's position.

52. Beginning in 1985, the union maintained a single list of both union and non-union members who were looking for work. However, there was also a typewritten membership list which contained all of the unemployed members in order of layoff. Only members were on this list. Non-members were not on this list. It was the typewritten list that was used for any reference.

53. Frequently, over the years, black applicants and black union members have called or contacted the Business Manager or the union for referrals with little or no success.

54. In October of 1986, Floyd Conrad informed the union membership of a new written referral policy effective in October 1987. Under the new policy, members would be referred to job openings in the order in which their names appeared on a referral list. The list was to be maintained in this manner: those members who had last worked were to be last to be selected from the list.

55. The 1987 referral system is facially objective and non-discriminatory. It refers to "persons" exclusively rather than "members" in describing those who may avail themselves of the system. The exception to the foregoing is the declaration that "members" may use the system in the interim period between the date of the notice explaining adoption of the system and October 1, 1987, effective date of the new system.

56. In administering the referral system, each month the union's secretary prepares a new monthly list: (i) deleting those names of those individuals from the prior month's list who either (a) have not advised the union on a monthly basis that they are still looking for work or (b) have worked more than forty hours the prior month; and (ii) adding the names of those individuals who have either signed the out-

of-work book or called since the last list was prepared advising the union that they are looking for work.

57. Referrals are made in the order of the list, i.e., to the person on the top of the list at the time the job becomes available who has the skills and qualifications to perform the job.

58. As late as January 1990, Mr. Conrad, other officers of Local 496, and subordinate employees have failed to instruct class members inquiring about membership or job referrals how this alleged new referral plan works. For instance, class members were not told that they needed to contact the local monthly in order to keep their names on the list. This had the effect of denying them opportunities to be referred to jobs.

International Union Involvement

59. At all relevant times, the referral system was administered solely by Local 496; no International Union representative or agent has participated in its operation.

60. Since March 1985, the International Union has been a signatory to a National Maintenance Agreement that permitted defendant Local 496 as its agent to fill all laborer job vacancies at the Perry Nuclear Power Plant.

61. Article III on page 2 of the National Maintenance Agreement requires the defendant International Union "to abide by all Executive Orders and subsequent amendments thereto, regarding the Civil Rights Act of 1964, pertaining to non-discrimination in employment, in every respect."

62. Article XIX of the National Maintenance Agreement provides that a signatory employer will hire workers "in accordance with the hiring procedure existing in the territory where the work is being performed."

63. The only work performed in Local 496's jurisdiction under the National Maintenance Agreement was at the Perry Nuclear Power Plant site.

64. Since March 1985, the International Union and Local 496 have maintained a principal and agency relationship regarding the referral of both union members and class members for jobs as laborers at the Perry Nuclear Power Plant.

65. Defendant Floyd Conrad, the Business Manager for defendant Local 496, regularly informed the Regional Office of the International Union about charges or lawsuits filed by the named plaintiffs and sent copies of all EEOC findings, both "cause" and "no cause," to that office.

66. The former Regional Managers of the International Union, Thomas J. Arconti and Charles Sutton, sent letters to the General President of the defendant International Union containing enclosures such as NLRB charges and other documents, EEOC findings, and newspaper clippings about claims of racial discrimination and retaliation by the defendant Local 496.

67. Further, the International Union had its own arrangements with the Equal Employment Opportunity Commission ("EEOC") and the National Labor Relations Board ("NLRB") to receive directly copies of charges alleging discriminatory action by its affiliated local unions, including Local 496.

68. The defendant International Union has a legal obligation under the National Maintenance Agreement, the AFL-CIO Constitution, as well as under the Civil Rights Acts of 1866 and 1964, to insure that its local unions do not engage in unlawful discriminatory conduct.

69. The Constitutions of Local 496 and of the International Union provided the International Union with

supervisory power and duties over Local 496 pursuant to which the International Union could intervene in the affairs of Local 496.

70. The International Union has the authority and control to take action to eliminate the discriminatory actions by defendant Local 496 and its employees.

71. The defendant International Union was aware of the discriminatory actions being taken by the defendant Local 496 and Floyd Conrad since May of 1983, but has continually refused to investigate charges of discrimination or take any action to correct this illegal conduct.

CONCLUSIONS OF LAW

1 This Court has jurisdiction over the subject matter of this action and the parties thereto by virtue of Title VII of the 1964 Civil Rights Act, *42 U.S.C. §§ 2000e*, et seq., and 28 *U.S.C. § 1343* for plaintiffs' claims under *42 U.S.C. § 1981*. Defendant Laborers International Union of North America ("International Union") is a labor organization under *42 U.S.C. §§ 2000e(d), (e)*. The Lake County, Ohio affiliate of the International Union, Laborers Local 496 ("Local 496") is also a labor organization under *42 U.S.C. §§ 2000e(d), (e)*. Defendant Floyd Conrad is an agent of Local 496 and, as such, is also subject to liability for racial discrimination. *42 U.S.C. § 2000e(d)*.

2. *42 U.S.C. §§ 20003*, et seq. ("Title VII"), condemns as an unlawful employment practice the exclusion of persons from union membership and/or from equal participation in a job referral system by the application of higher standards to members of minority groups than to white persons because of race, color or national origin.

3. Defendants contend that plaintiffs' charges of discrimination under Title VII were not timely filed with the

Equal Employment Opportunity Commission ("EEOC"). Under Title VII, a charge of discrimination must be filed with the EEOC within 180 days after the discrimination occurred. *42 U.S.C. § 2000e-5(e)*. Timely filing of a charge with the EEOC is a prerequisite to suit in this Court. *Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 71 L. Ed 2d 234, 102 S. Ct. 1127 (1982); United Air Lines, Inc. v. Evans, 431 U.S. 553, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977)*. Plaintiffs must further file their complaint in this Court within 90 days after the EEOC notifies them of their right to sue. *42 U.S.C. §2000e-5(f)*. The Court finds that plaintiffs' charges of discrimination were timely filed with the EEOC because defendants discriminated against plaintiffs within 180 days before they filed their discrimination charges. The Court further finds that plaintiffs timely filed their complaint in this case within 90 days after the EEOC notified them of their right to sue.

4. *42 U.S.C. § 1981* prohibits intentional discrimination in the making and enforcement of contracts. Section 1981 prohibits intentionally discriminatory union membership and referral practices.

5. Defendants also claim that plaintiffs' cause of action under *42 U.S.C. § 1981* is barred by the applicable statute of limitations. Congress has not specified a statute of limitations period for actions under *42 U.S.C. § 1981*, so this Court must apply the appropriate state statute of limitations. *Goodman v. Lukens Steel Co., 482 U.S. 656, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987)*. The Court finds that the applicable statute of limitations is Ohio's two-year statute of limitations for personal injuries under Ohio Rev. Code Ann. § 2305.10, which is applied in this Circuit in analogous actions under *42 U.S.C. § 1983*, see *Browning v. Pendleton, 869 F.2d 989 (6th Cir. 1989)*. The Court finds that plaintiffs have proved that the defendants discriminated

against them within the two years before they filed their complaint in the present case.

Therefore, plaintiffs' complaint under *42 U.S.C. § 1981* was timely filed.

6. Both Title VII and *42 U.S.C. § 1981* provide relief when a union's conduct is based, at least partially, on one of the specifically forbidden factors, such as race. *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); King v. Laborers Internat. U. of No. America, U. L. No. 818, 443 F.2d 273, 278 (6th Cir. 1971).* Evidence of defendants' discriminatory practices occurring before the period during which class members applied for membership and/or referrals is admissible to show:

(a) defendants' discriminatory intent and the effect of their policies. See, e.g., United States v. Local Ironworkers, 438 F.2d 679 (7th Cir. 1971), cert denied, 404 US. 984 (1971); United States v. Local 86, Ironworkers, 315 F. Supp. 1202 (W.D. Wash. 1970), affd, 443 F.2d 554 (9th Cir. 1971), cert. denied, 404 *US. 984, 30 L. Ed. 2d 367, 92 S. Ct. 447;*

(b) the existence of a longstanding pattern or practice of discrimination continuing to the present time, *United States v. Local 35, Sheet Metal Workers, 416 F. 2d 123 (8th Cir. 1969);* and

(c) that present policies or practices, facially neutral, perpetuate the effects of past discrimination, *United States v. Local 1, Ironworkers, supra; Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969); United States v. Local 36, SheetMetal Workers, supra;* United States v. Local 86, Iron Workers, supra.

Disparate Impact

7. Plaintiffs contend that Local 496's membership and referral practices have had a disparate impact on blacks. Proof of disparate impact gives rise to a prima facie case of discrimination under Title VII upon showing that the practices operate to exclude members of a protected class, regardless of whether the defendant intended to discriminate. The burden then shifts to the defendant to show that its practices are a business necessity. *Griggs v. Duke Power Co., 401 U.S. 424, 431-32, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971); Equal Employment Opportunity Commission v. Local 798, 646 F.Supp. 318, 325 (N.D. Okl. 1986).* Disparate impact is often proved through statistical evidence. *Coe v. Yellow Freight System, Inc., 646 F.2d 444, 450 (10th Cir. 1981).*

8. The practices which plaintiffs claim had a disparate impact on blacks are (1) the practice of admitting into the union only persons who are "in the calling" and (2) the practice of referring only union members for jobs.

9. The relevant geographic area for purposes of comparison of the labor force with the membership of Local 496 is the four-county area from which the union draws the majority of its members, not only the county over which the local has jurisdiction. *EEOC v. Local 14 International Union of Operating Engineers, 553 F. 2d 251 (2d Cir. 1977).* The four-county area is comprised of Lake, Ashtabula, Cuyahoga and Geauga counties.

10. Local 496's membership and referral policies have resulted in a disproportionately small percentage of black union members as compared to the relevant labor force. Plaintiffs' statistical evidence shows a gross disparity between the percentage of blacks in the membership of Local 496 and the labor force of the four-county area, both

in terms of total number of members during the relevant period and in terms of the new members taken in during this period.

11. The statistical disparities are sufficient to establish a prima facie case of discrimination under the disparate impact theory. In addition, other evidence of discriminatory treatment of class members supports the statistical evidence and together the evidence raises an inference of intentional discrimination. *Ingram v. Madison Square Garden, 482 F. Supp. 414 (S.D. N.Y. 1979)*, affd, *709 F. 2d 807 (2d Cir. 1983)*.

12. It is unlawful discrimination for a union to apply qualifications which have a racial impact and are unrelated to successful job performance or business necessity. See e.g., *Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971)*, cert. denied, *406 U.S. 906 (1972)*; EEOC Guidelines on Employee Selection Procedure, 29 C.F.R. 1607.1, et seq.

13. When a union has engaged in racially discriminatory practices and exercises substantial control over construction job opportunities, it cannot require minority workers to be working in the trade if the union's own work referral policies have kept blacks from obtaining work in the trade. This experience requirement perpetuates the effects of past discrimination and constitutes present unlawful discrimination. See, e.g., *United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969)*, cert. denied, *397 U.S. 919, 25 L. Ed. 2d 100, 90 S. Ct. 926 (1970); United States v. Local 36, Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969)*.

14. Defendants here have failed to produce sufficient evidence of a job-related business justification for the membership and referral policies that have a disparate impact on blacks. The "working-the-calling" rule offered by the local as justification cannot justify the extreme adverse impact, since even if applied in a non-discriminatory fashion, it simply works to reinforce past patterns of discrimination. See, e.g., *Gibson v. Local 40, Supercargoes & Checkers, 543 F.2d 1259 (9th Cir. 1976).*

15. The union has failed to offer any justification for its policy of not referring non-members of the union for laborers' jobs. This policy is contrary to the union's agreement with the Perry Plant contractors and to the National Labor Relations Act *(29 U.S.C.* § 158(b)(1XA)). In addition, this practice has the effect of discriminating against blacks.

16. Even if the "working-the-calling" rule offered by Local 496 as justification for the statistical underrepresentation of blacks in the union were deemed sufficient to satisfy its burden of production of a business justification, plaintiffs have proven the existence of a less restrictive alternative: the Local could have referred plaintiffs to jobs and then allowed them to join the union.

This is the policy that the contract with the Perry Plant called for and is the policy the Local claims to have put into effect in 1987, presumably without violating its constitution.

Disparate Treatment

17. The plaintiffs are claiming that they were treated differently than other white applicants for union membership and referral to jobs by Local 496 and Floyd Conrad because of their race. Thus, plaintiffs are also proceeding under a disparate treatment theory. *International*

Brotherhood of Teamsters v. United States, 431 U.S. 324, 52 L. Ed 2d 396, 97 S. Ct. 1843 (1977).

18. Disparate treatment involves intentional discrimination. Proof of discriminatory motive is necessary. Discriminatory motive can be inferred from the fact of difference in treatment. *International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, 52 L. Ed. 2d 396, 97 S. Ct. 1843 ii. 15 (1977).* Intentional discrimination through disparate treatment violates both Title VII and *42 U.S.C. § 1981. Goodman v. Lukens Steel Co., 482 U.S. 656, 669, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987).*

19. Under *McDonnell Douglas Corp. v. Green, supra,* the United States Supreme Court established a test to prove a prima facie case of discrimination. The plaintiffs may meet their initial burden by showing: (1) that they belonged to a racial minority; (2) that they applied and were qualified for a job or union membership; (3) that they were rejected for the position and/or union membership; and (4) that a white person was referred to the job and/or became a member of the union. McDonnell Douglas Corp., supra, at 802.

20. The plaintiffs carry the initial burden of establishing a prima facie case of racial discrimination under this disparate treatment analysis. If they succeed, the burden then shifts to the defendant to propound a legitimate reason for its action. *McDonnell Douglas Corp. v. Green, supra, at 802; Dickerson v. United States Steel Corp., 439 F. Supp. 55, 75* (E.D. Pa., 1977). This reason must be based on admissible evidence showing a specific legitimate, non-discriminatory basis for the challenged action. *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-58, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).* The reason cited must be tested against facts known to the defendant at the time of its action. Post hoc rationalizations, however

persuasive, will not suffice. *Williams v. TWA, 660 F. 2d 12676 (8th Cir. 1981).* See, generally, Belton, Burdens of Pleading and Proof in Discrimination Cases, *34 Vand. L. Rev. 1205* (October 1981).

21. The order of proof under *McDonnell Douglas Corp. v. Green, supra,* allows for one additional step. Assuming that the plaintiff has made out a prima facie case of discrimination which has been rebutted by the union's demonstration of a legitimate non-discriminatory reason for the challenged action, plaintiffs must then be afforded a "fair opportunity to show that the justification offered by the defendant was in fact pre-text." *411 U.S. at 804.* A showing of pretext does not require that the plaintiff conclusively demonstrate that the factors articulated by the defendant were wholly irrelevant to the challenged practice and that race was the sole causative factor. Rather, it is sufficient to demonstrate that, regardless of the validity of the defendant's assertions, race was one cause. *McDonald v. Santa Fe Trail, 427 U.S. 273, 282, 49 L. Ed. 2d 493, 96 S. Ct. 2574 n. 10 (1976).*

22. Plaintiffs have met their initial burden of proof based on a disparate treatment analysis. The evidence introduced shows that: (1) the plaintiffs are black; (2) they were available for referral by the union for job opportunities at the Perry Nuclear Power Plant and to become a member of the union; (3) they did not receive referral for the many job opportunities despite the fact that they should have been referred according to the referral policy the union was supposed to follow; and (4) white non-members were referred to jobs to which plaintiffs had applied and were made members of Local 496.

23. It is a violation of Title VII and § 1981 for a union to engage in practices that have the effect of discouraging minority applicants from applying for employment in the

trade. *United States v. Local 86, Ironworkers, supra.* Specifically, it is unlawful for a union to give false, misleading or incomplete information to minority persons. In addition, it is unlawful for a union to fail or refuse to inform minorities of work opportunities or of the procedures for membership application, referral, or apprenticeship training. *United States v. Local 86, Ironworkers, supra.* The evidence in this case demonstrates that minority persons were not informed of Local 496's procedures for membership and referral for jobs.

24. It is unlawful for a virtually all white union to give preference with regard to union membership or work referral opportunities to union members and their friends and relatives, by relying on word-of-mouth dissemination of information or otherwise. *Parham v. Southwestern Bell Tel. Co., 433 F.2d421, 425 (8th Cir. 1970); United States v. Local 36, Sheet Metal Workers, supra.* The evidence in the record shows a pattern and policy of favoritism to friends and relatives. Such a practice is almost inherently discriminatory. *United States v. Woo4 Wire & Metal Lath. mt. Union, Local 46, 328 F. Supp. 429, 436 (S.D. N. Y. 1971).* See also, *United States v. Bricklayers Local No. 1, 5 E.P.D. P8480* (W.D. Tenn.), affd, *497 F. 2d 871 (6th Cir. 1973).*

25. The union has failed to offer any justification for its policy of not referring non-members of the union for laborers' jobs. This policy is contrary to the union's agreement with the Perry Plant contractors and to the National Labor Relations Act *(29 U.S.C. § 158(bX1XA)).* In addition, this practice has the effect of discriminating against blacks.

Conclusion

26. In view of the Findings and Conclusions, plaintiffs have sustained the required burden of proof in establishing that Local 496 and Floyd Conrad have engaged in a pattern or practice of discrimination which constitutes an unlawful employment practice in violation of *42 U.S.C. §§ 2000e-2(a)*, (c), and *42 U.S.C. § 1981*.

27. The International Union can be held liable under two different legal theories. First, it can be held liable for the acts of Local 496 and Floyd Conrad if Local 496 was acting as agent of the International Union. Second, the International Union can be held liable if it has violated an affirmative duty under Title VII and § 1981 to oppose discriminatory practices of Local 496. *Berger v. Iron Workers Reinforced Rodmen Local 201, 269 App. D. C. 67, 843 F. 2d 1395 (V. C. Cir. 1988)*, cert. denied, *109 S. Ct. 3155 (1989)*.

28. Under the agency theory, the International Union can be liable for the actions of the local union if Local 496 acted as the agent of the International Union. Therefore, the Court must first decide whether an agency relationship existed. The test to determine whether an agency relationship exists is essentially one of balancing the character of the business affairs subject to the International's control and supervision against those left to the discretion of the local. *Berrigan v. Greyhound Lines, Inc., 560 F. Supp. 169 (D. Mass. 1982)*. A court should look at such factors as internal management, contract negotiation and the constitutions of the two organizations. *Berrigan, 560 F. Supp. at 168; Berger, 843 F.2d at 1430*.

29. A principal may be held liable for the intentional acts of its agent if the agent's conduct is within the scope of its agency and if, with knowledge of the conditions, the

principal intends the conduct or intends the consequences. *Berger, 843 F.2d at 1430;* Restatement of Agency 2d, Section 1 (1958). Thus, the International Union may be held liable on the class claims if, with knowledge of the surrounding circumstances, it authorized, ratified, approved or acquiesced in the local's actions, the effects of which are sufficient to establish a claim of intentional discrimination against Local 496. *Berger v. Iron Workers Reinforced Rodmen Local 201, 269 App. D.C. 67, 843 F.2d 1395 (D.C. Cir. 1988); Farmer v. ARA Services, 660 F.2d 1096, 1104 (6th Cir. 1981); EEOC v. Detroit Edison Co., 515 F.2d 301, 314 (6th Cir. 1975).*

30. Because the Court finds that the International Union was aware of the discriminatory actions of Local 496 and Floyd Conrad both before and after March 1985 regarding refusing to make referrals to class members or permitting them to become union members and further finds that the International Union acquiesced in those actions, the Court finds for class members in their claims against the International Union.

31. A labor organization in some circumstances has an affirmative duty to oppose discriminatory practices of its affiliated locals. Whether an affirmative duty exists depends on whether there was a substantial connection between the International Union and the local such that the International Union would both know of the discriminatory practices and be expected to intervene to oppose them. *Kaplan v. Intern. Alliance of Theatrical, etc., 525 F.2d 1354, 1360 (9th Cir. 1975).*

32. The International Union had been on notice for many years of the class member charges of discrimination against the local and of the reasonable cause findings that had been issued by the EEOC. Furthermore, the International Union was a party to the contract regulating

labor relations at the Perry Nuclear Power Plant, the largest source of employment of Local 496 members during the relevant period. The Court finds that the International Union had an affirmative duty to oppose the discriminatory practices of Local 496, and that it breached its duty by failing to take any corrective action.

33. Based upon the foregoing Findings and Conclusions, plaintiffs have sustained the required burden of proof in establishing that the International Union is liable for the acts of Local 496 and Floyd Conrad and in establishing that the International Union violated an affirmative duty under Title VII and § 1981 to oppose discriminatory practices of Local 496.

34. Defendants Local 496, Floyd Conrad, and the International Union are liable for violations of 42 *U.S.C.* §§ *2000e* and 1981.

35. This case was bifurcated, first, to try the issues of liability, and then, if there was liability as against any of the defendants, the case would proceed to trial on the issue of damages. Inasmuch as each defendant has been found liable to plaintiffs, this case will proceed to trial on the issue of damages.

/s/Alvin I. Krenzler, United States District Judge

Alan Rossman

Edward Kramer

Alan Beklin

Lawrence Oberdank

Thomas Barnard

Theodore Green

SCHEDULING ORDER

The Court has found that each of the defendants is liable to plaintiffs for violations of 42 *U.S.C.* §§ *1981* and 2000e-2. In accordance with the previous order of this Court bifurcating the trial in this case, the case will now proceed to trial regarding damages. The parties shall submit an Attorneys' Pretrial Statement on or before February 11, 1992. The parties shall follow the requirements for preparation of the Attorneys' Pretrial Statement as found in this Court's Standing Order. If the case is settled, the parties are required to immediately notify the Court, in accordance with this Court's Standing Order. After the filing of the Attorney's Pretrial Statement, the case will be called for Trial upon reasonable notice by the Court.

/s/Alvin I. Krenzler, United States District Judge

Alan Rossman

Edward Kramer

Alan Beklin

Thomas Barnard

Theodore Green

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-3806/3823/3854/3857/3858

DAVINE ALEXANDER, ET AL.,

Plaintiffs-Appellees/
Cross-Appellants (96-3858),

v.

LOCAL 496, LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA; FLOYD CONRAD,

Defendants-Appellants
(96-3823/3854)/Cross-Appellees,

LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA,

Defendant-Appellant
(96-3823/3854)/Cross-Appellee.

Filed June 30, 1999

Before Keith, Batchelder and Cole, Circuit Judges.

Order

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

(3)

No. 99-739

Supreme Court, U.S.
FILED
DEC 29 1999
OFFICE OF THE CLERK

In The Supreme Court of the United States

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,

Petitioner,

v.

DAVINE ALEXANDER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether an International Union can be held liable under Title VII and 42 U.S.C. § 1981 under an agency theory for the discriminatory actions of an affiliated local on a record including facts such as: the International was the signatory on a National Maintenance Agreement containing a clause requiring the International to insure that all applicable civil rights laws will be complied with; the International delegated its referral authority to an affiliated local while on notice that the affiliated local had engaged in a historical pattern of discrimination based in part upon the application of a rule dictated by the International Constitution; and the International Union was on notice of continuing discrimination by the local union in its referral and membership policies.

2. Whether an International Union which has delegated its responsibility as to referrals under a contract signed by the International to a local affiliate with an historical pattern of discrimination is under an affirmative obligation to investigate charges of discrimination by the local which stem in part from the application of a rule created by the International Union.

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No. 99-739

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1999

LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA
Petitioner,

v.

DAVINE ALEXANDER, et al.
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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STATEMENT OF THE CASE

A. Factual Background

Respondents incorporate by reference the statement of facts in the opinion of the Sixth Circuit Court of Appeals, Pet. App. 2a-8a, and the findings of fact by the District Court. Pet. App. 75a-95a. In addition, Respondents wish to call the Court's attention to certain facts omitted from Petitioner's recitation.

Regarding the National Maintenance Agreement signed by Petitioner Laborers International Union of North America ("LIUNA") in 1985, it is important to note that the agreement was "between the employer and the International Union only." It is true as pointed out by Petitioner that "no LIUNA representatives or agents were involved" in the administration of the referral system for the Perry Plant. Petitioner neglected to mention that "the Maintenance Agreement provided that Local 496 was to act as LIUNA's agent in filling all labor vacancies at Perry." Pet. App. 5a. In addition, while the Project Labor Agreement (PLA) provided that union membership and constitutional provisions would not affect referrals, the Maintenance Agreement contains no such provision.

The District Court also found that LIUNA was aware of over 50 discrimination charges filed against Local 496 because the business manager of Local 496 had informed International Union Regional Representatives Thomas J. Arconti and Charles Sutton who, in turn, notified the International's General President of the charges. Further, LIUNA had its own arrangement with the Equal

Employment Opportunity Commission to forward to it copies of charges filed against affiliated locals, including Local 496. Finally, the District Court found that LIUNA had the power and authority under its constitution to intervene in the affairs of its affiliate local union to eliminate discriminatory activities. Pet App.93a-95a.

B. Proceedings Below

Respondents' disagreement with Petitioner's characterization of the lower court holdings is discussed in the argument that follows. As to the proceedings in the lower courts, Respondents wish to add that, following the District Court's judgment as to liability, LIUNA moved for reconsideration three times. All three of its motions were denied. The second of those motions, styled a Motion for Clarification or for Reconsideration, was referred to Magistrate Judge Hemann, who recommended denial of the motion. Her report and recommendation, which was subsequently adopted by Judge O'Malley, is reported as *Alexander v. Local 496*, 860 F.Supp. 410 (N.D.Ohio 1994).

REASONS FOR DENYING THE WRIT

In petitioning the Court to review the lower court decisions in this case, Petitioner Laborers' International Union of North America (LIUNA) is primarily asking the Court to conduct an in-depth factual inquiry to determine whether the lower courts properly applied the law to the facts as presented in the record. LIUNA understandably disagrees with the factual conclusions the lower courts reached and, in addition, seems to challenge the validity of

one of the theories of liability applied here. Petitioner also makes unsupported assertions that the lower court decisions provide dangerous precedent that could lead to dire consequences for both international unions and parent corporations.

The Court should deny Petitioner's request for review for a number of reasons. First, even if this Court were inclined to accept for review a case in which its primary task on review would be to determine whether the facts in the record support the judgment,[1] as is shown below, under the proper clearly erroneous standard of review, the Court would have to affirm. Moreover, as to the legal arguments raised by Petitioner, the lower Courts both applied theories of liability that have been consistently recognized by other courts, including those courts whose opinions are cited and relied on by LIUNA. And while Petitioner makes exaggerated claims of the possible far-reaching effects of the decisions below, especially as to the affirmative duty theory of liability, a more sober review of the holdings below indicates that there is nothing new here beyond an unusual factual record that supports the finding that LIUNA can be held liable under both the vicarious liability and affirmative action theories. That courts have not found liability under one or both of these theories on different facts undercuts Petitioner's argument that this case

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[1]Of course, such a role is not one in which the Court should place itself: "A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

deserves the Court's attention. Because the decisions below are in accordance with settled law, the petition should be denied.

I. THIS CASE TURNS ON FACTUAL DETERMINATIONS AND WAS CORRECTLY DECIDED BY THE LOWER COURTS

The U.S. Court of Appeals for the Sixth Circuit determined that LIUNA was both independently and vicariously liable for the historical pattern and practice of discrimination by Local 496. Either finding is sufficient to support the judgment of the Court of Appeals.

The Court of Appeals affirmed the District Court's finding that an agency relationship existed between LIUNA and Local 496. The factual basis for this finding is interwoven into the findings of fact of the District Court and will not be fully reiterated here. Some of the key points are: Local 496 had a historical pattern of racial discrimination which pre-dated the Perry Nuclear Power plant project; the working in the calling rule which was responsible in part for the disparate impact; LIUNA was responsible for the creation of the working in the calling rule; the National Maintenance Agreement which provided for Local 496 to be the exclusive hiring hall for work at Perry was negotiated and signed by LIUNA; the National Maintenance Agreement requires that a signatory employer hire workers in accordance with the hiring procedure existing in the territory where the work is performed; LIUNA delegated its hiring authority under the National Maintenance Agreement to Local 496; and that, pursuant to the National Maintenance Agreement, LIUNA

assumed the non-delegable duty to insure that all hiring was done in a non-discriminatory manner.

The District Court further found that the Constitution of LIUNA created the working in the calling requirement which formed the basis of the historical discrimination against blacks practiced by Local 496. The Court of Appeals noted "having approved a practice of the local that was later found to be discriminatory in effect, the international would surely have been held accountable for the local's conduct under the agency standard of the common law." Pet. App. 24-25a (*quoting Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1428 (D.C.Cir. 1988), *cert. denied*, 109 S. Ct. 3155 (1989)). The Court of Appeals, having determined that the historical pattern and practice of discrimination practiced by Local 496 was directly related to LIUNA's working in the calling rule, stated that "we are baffled and amazed as to how LIUNA can contend that it did not instigate, support, ratify, or encourage a policy that it created." Pet. App. 24a. This holding is in line with similar decisions of other appellate courts. *See, Kaplan v. IATSE*, 525 F.2d 1354 (9th Cir. 1975) (noting that Title VII is violated by "the failure of an international union to act when aware of discrimination resulting from a collective bargaining agreement" that was negotiated by the international itself); *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 736 n.32 (5th Cir. 1976) (stating that International Unions who are parties to national agreements have a duty under Section 1981 to inquire into the effect of contract provisions when it is reasonable to assume that such provisions might lead to discrimination, and that international unions have an affirmative obligation to protect members from agreements that they help negotiate when such agreements "lock in" past discrimination.) *See also, United*

States v. Virginia Electric and Power Co., 327 F. Supp. 1034, 1042 (E.D.Va.1971) (holding the international liable for the discriminatory results of a collective bargaining agreement to which it was a signed party).

LIUNA erroneously characterizes the holding of the U.S. Court of Appeals for the Sixth Circuit to be based upon a finding of mere acquiescence. (Pet. p. 19) The language of the opinion clearly refutes this position. LIUNA argues in effect that the only basis of the finding of liability on the part of Local 496 related to its administration of the project labor agreement ("PLA"). This again inaccurately characterizes the majority opinion. The Sixth Circuit panel determined that there was an ongoing history of discrimination practiced by Local 496, and that the referral practice under the PLA was the most recent example of such discrimination. LIUNA's affirmative duty to take action to remedy past discrimination by Local 496 likewise followed from the fact that LIUNA created the rule which resulted in the disparate impact and served to lock in past discrimination.

II. THE THEORIES OF LIABILITY UNDER WHICH LIUNA WAS FOUND LIABLE ARE VALID AND IN ACCORDANCE WITH SETTLED LAW

The District Court found that Local 496 was guilty of intentional discrimination against class members in both its membership and job referral policies, and that LIUNA was liable under both agency and affirmative duty theories. Pet. App. 105a-106a. Under the agency theory, LIUNA was held liable according to principles of vicarious liability. The second theory held LIUNA to primary liability based upon an affirmative duty to oppose known discrimination by

its local. Both theories have been applied to questions of liability of international unions by a number of courts. Both require a careful analysis of the facts of a specific case to determine whether liability can be found.

A. Vicarious Liability

Agency doctrines have often been employed to find labor unions liable for the acts of their agents. *Local 1814, Int'l Longeshoremen's Assoc. v. NLRB*, 735 F.2d 1384, 1394 (D.C. Cir.1984). *See also*, *Amendolare v. Schenkers Intern. Forwarders, Inc.*, 747 F. Supp. 162, 170-71 (E.D.N.Y. 1990) (holding that apparent authority could be used to find labor union liable under RICO for negligence or acquiescence in allowing criminal element to infiltrate its organization). Generally, the existence and scope of agency relationships are factual matters. *Metco Products, Inc. v. NLRB*, 884 F.2d 156 (4th Cir. 1989); *N.L.R.B. v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Local 1814, Int'l Longshoremen's Ass'n*, 735 F.2d at 1394. Whether the law imposes liability on an international union for discriminatory acts of a local affiliate depends on the entities' interrelationship with respect to the act from which liability stems. *Sinyard v. Foote & Davies Div. of McCall Corp.*, 577 F.2d 943, 945 (5th Cir. 1978). *See also*, *Glus v. G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980), *vacated*, 451 U.S. 935, 101 S. Ct. 2013, 68 L. Ed. 2d 321 (1981), *and on remand aff'd in relevant part*, 654 F.2d 944 (3d Cir. 1981) (International union held liable as sole signatory to collective-bargaining agreement for a portion of the period during which discrimination took place); *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 851 (5th Cir.1977) (affirming district court's holding that the international

union was liable based on the fact that the "international would generally provide advisors to review and often comment upon the local's bargaining positions," and the local would submit contracts to the international for approval); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270-71 (4th Cir.1976) (international held liable where the vice president of the international acted as "advisor" to the local, played active role in negotiations for bargaining agreements in 1971 and 1974, and all collective bargaining agreements needed the approval of the international); *Sagers*, 529 F.2d at 737 (international union held liable under Title VII due to its involvement with the contracts at issue).

There is nothing new here. As these cases indicate, agency law has long been applied in cases involving the question of an international union's liability for actions of a local. As pointed out by Petitioner, in some cases the courts find that no agency relationship exists that would support a finding that an international is liable for the actions of a local. *E.g.*, *Brenner v. Local 514*, 927 F. 2d 1283 (3d Cir. 1991) (after very fact-specific inquiry, court notes that International not party to collective bargaining agreement and holds that local not acting as agent); *Phelan v. Local 305*, 973 F. 2d 1050 (2d Cir. 1992) (court looks carefully at record to decide that LMRA claims for failure to refer a member for jobs due to internal local union politics do not implicate United Association); *Shimman v. Frank*, 625 F. 2d 80 (6th Cir. 1980) (after thorough analysis of facts, court finds international union not liable

under common law agency principles)[2]; *Sinyard*, 577 F.2d 943 (after careful examination of the facts, court finds lack of involvement of international in challenged activities); *Chapa v. Local 18*, 737 F. 2d 929 (11th Cir. 1984) (looking at specific facts, court holds that presence of international officers at local meetings, in which one international official participated in his capacity as officer of local and the other merely observed, not sufficient to establish agency relationship).

What is common in both sets of cases is the care with which the courts view the factual record in trying to determine whether an international union can be held vicariously liable for the actions of a local union under agency principles, because the agency relationship determination is very dependent on the facts of the specific case: "The diverse situations possible in the varied relationships between parent and local unions make individual examination of the facts, rather than a mechanical application of assumptions, a vital necessity." *Sinyard*, 577 F. 2d at 947. The vicarious liability determination is quite fact-specific. As discussed above, the lower courts in this case made detailed factual findings on the way to their liability finding as to the International and it is these findings with which the International disagrees.

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[2] Though the result in this prior decision of the Sixth Circuit differs from the case at hand, the court was consistent in both cases in carefully reviewing the factual record to determine whether an agency relationship could be found under common law agency principles. Thus, the law in the Sixth Circuit is consistent with that of all the other circuits that have dealt with these issues.

Petitioner complains that the lower courts premised liability solely on LIUNA's failure to remedy the discrimination of Local 496. However, Petitioner conveniently ignores one of the crucial facts establishing an agency relationship: LIUNA signed the National Maintenance Agreement and gave Local 496 the responsibility to act as its agent in making referrals. Indeed, Local 496 had sole responsibility for referrals even though half of the referrals were to go to Local 860. This arrangement enabled the business agent of Local 496 to send all requests for black laborers to Local 860, thus avoiding referring any members of the class. But, more importantly for this Court's purposes, what is lacking from Petitioner's argument is an indication that the lower courts applied a wrong standard of law. Of course, such an argument would be unavailing, since both the District Court and the Court of Appeals specifically discussed and applied the same common law agency principles that are set forth by Petitioner as controlling. For instance, the Court of Appeals relied upon and quoted both *Carbon Fuel v. United Mine Workers*, 444 U.S. 212, 217-18 (1979); the case upon which Petitioner places the heaviest reliance,[3] as well as

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[3] In that case, the Fourth Circuit carefully looked at the factual circumstances and determined that in light of the bargaining history and the specific terms of the collective bargaining agreement, the International could not be held vicariously liable. *Carbon Fuel Co.*, 582 F.2d at 1350. This Court affirmed, relying on the common law agency theory. 444 U.S. at 216. In the present action the lower courts applied the same agency principles to such factual circumstances as LIUNA being a signatory to the National Maintenance Agreement, which imposed duties and allowed the local, as agent of LIUNA, to fill vacancies at the Perry Nuclear Power Plant, and arrived at a different result.

Sinyard, 577 F. 2d at 945, upon which Petitioner also extensively relies.

The leading case on these issues is *Berger*, 843 F. 2d 1395; which, as pointed out by Petitioner, dissenting Judge Batchelder said "aptly ties together the existing case law and sets forth the correct approach." Pet. App. 59a n.16. Virtually all decisions dealing with these issues since *Berger* use it as a starting point. So did the Sixth Circuit in its decision below, paraphrasing *Berger* at length. Pet. App. 22a. The Court made clear that it was applying the common law agency principles espoused by the *Berger* court for such determinations. That Petitioner is unhappy with the result of that application is not grounds for review by this Court.

B. Affirmative Duty

In *Berger*, the court recognized that in certain circumstances a labor organization's failure to act to prevent discrimination by others "may be an independent basis for liability under Title VII and section 1981." *Berger*, 843 F. 2d at 1429. In that case the court did not reach the question of whether the International union could be held liable in that way for breaching an affirmative duty to oppose discrimination by its local. Other courts have found international unions to be in breach of affirmative obligations to act when aware of discrimination. *Kaplan*, 525 F.2d at 1360; *Myers*, 544 F.2d at 850.

Petitioner seems to be arguing that an international union can never be held liable for discrimination by a local union under an affirmative duty theory. This is contrary to

Berger and other courts who have found the possibility of such liability. It is true that a number of courts have rejected claims of liability premised on affirmative obligations, but those decisions are based on the facts presented in those cases. None of the decisions precludes the possibility of such a claim.

In the instant case, the District Courts below made factual findings that LIUNA was or should have been aware of the discriminatory practices of Local 496 but refused to investigate or take any action whatsoever. Pet. App. 95a. Of course that refusal to investigate must be viewed in the context of LIUNA's delegation to the local of the referral duties under the contract it signed and the numerous indications of complaints about the way the local undertook to fulfill those referral duties. As the material in its files shows, LIUNA was on notice of Local 496's discriminatory policies since at least May of 1983. Yet, LIUNA admitted that it did nothing to investigate the many charges of discrimination against the Local.

LIUNA adhered to a "hear no evil, see no evil" approach in spite of being regularly informed of charges filed against the local. Indeed, LIUNA defended on the ground that it did nothing to investigate the charges. LIUNA's argument is in direct conflict with the broad remedial purposes of Title VII and Section 1981, as well as LIUNA's duties under the National Maintenance Agreement. LIUNA cannot remain wilfully blind in the face of numerous charges of discrimination against a local union which it has designated its agent to handle referrals to a project - especially when that local uses LIUNA's own constitutional provision to effect that discrimination - and

then cite its own deliberate inaction as evidence that it did not have knowledge of the merit of the charges.[4] *Macklin v. Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (D.C. Cir. 1973)(failure of an international union to take action after becoming aware of discrimination resulting from a collective bargaining agreement constitutes a Title VII violation).

LIUNA's cites to the concurring dictum of *Goodman v. Lukens Steel Co*, 482 U.S. 656, 688 (1987), which states "an affirmative duty to oppose employer discrimination would work [a disruption in the basic policies of the labor laws]." (emphasis added). Here it is the discrimination by the local union, not an employer,

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[4] LIUNA's "hear no evil, see no evil" argument is similar to an argument rejected by the United States Supreme Court in *Am. Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 569-574 (1982) (distinguishing *UMWA v. Coronado Coal Co.*, 259 U.S. 244 (1922). The case involved a private cause of action under the antitrust laws. The Defendant, a non-profit association, argued that it could not be held liable under an "apparent authority" theory, and that it was only liable if it affirmatively ratified the actions of it agents. In rejecting this approach, the Supreme Court noted that a "principal purpose of the antitrust private cause of action. . . . is, of course, to deter anticompetitive practices." *Id.* at 572 (citations omitted). The court stated that under defendant's rule, the defendant "could avoid liability by ensuring that it remained ignorant of its agents' conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents." *Id. See also, Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779 (11th Cir.1992) (common law agency principles broadly construed under the NLRA due to "clear legislative policy to remove all taint of an employer's compulsion, domination, or influence.") (citations omitted). Title VII and §1981 are similarly remedial and deterrent in nature.

which is challenged. This differs substantially from the situation described in the *Goodman* concurrence. LIUNA licenses the local and has greater control over its actions. LIUNA lends its name and credibility to the Local. As the majority opinion in the Court of Appeals points out (Pet. App. 23a n.7), the question of whether an agency relationship exists between an employer and a union, traditionally on opposite sides in the structure of labor relations, is very different than the question as to such a relationship between an international and one of its affiliates. More instructive is the majority opinion in *Goodman*, which held the union liable for deliberate inaction. *Id.* at 666.

The situation is also substantially different from the labor cases cited by LIUNA. Neither strikes nor lockouts are *per se* prohibited. *See, e.g., American Shipbuilding Company v. NLRB*, 380 U.S. 300, 85 S.Ct. 955 (1965). In sharp contrast, racial discrimination is prohibited by Title VII and § 1981.[5] These statutes are remedial in nature, designed to remedy the lingering effects of past discrimination. *See, e.g., Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505, 511 (6th Cir. 1991).

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[5] Although a strike in breach of a no strike clause is prohibited, it is *mal in prohibitum*, rather than *mal in se*.

LIUNA had knowledge of the surrounding circumstances of Local 496 via its contacts with the EEOC and communications from regional officials of the International Union. Moreover, LIUNA had negotiated and signed the agreement which authorized Local 496 to act as its agent when referring individuals to work at the Perry site. Finally, and most importantly, the International Union acquiesced in the discriminatory activities of Local 496. Unlike the purely economic issues involved in the cases cited by LIUNA, there is a moral dimension to the issues presented here.

III. THIS CASE PRESENTS NO ISSUE REQUIRING REVIEW BY THIS COURT

As discussed above, the lower courts in deciding this case applied settled law as regards the liability of LIUNA. LIUNA's real quarrel with the decisions below concerns the application of the facts to that law. Thus, this is not a case meriting review by this Court.

Moreover, the dire consequences predicted by LIUNA concerning the likelihood that international unions will now be subject to suit for any alleged civil rights violations of any of their affiliates as a result of the holding by the Sixth Circuit in this case will simply not occur. Again, the principles of law applied here are hardly novel. It is only under the type of egregious facts found by the District Court in this case that an international union has reason to fear the possibility of liability. Petitioner should not doubt the ability of the federal courts to competently distinguish cases in which the facts do not support liability under either accepted theory from those in which the facts

do. *See, e.g., Laughon v. International Alliance of Theatrical Stage Employees*, 1999 U.S. Dist. LEXIS 4783, *24 (N.D. Cal. April 2, 1999)[unreported]; in which the court cited to the District Court opinion in this case for its affirmative duty holding, yet found that based upon the facts presented in that case, the international union could not be held liable under either the vicarious liability or the affirmative duty theories.

Nor is it likely that the decisions below would be utilized to create heretofore unforseen liabilities for corporate parents for the activities of subsidiaries or on affiliated employers, as suggested by Petitioner. Again, the decisions below do not make new law in the international-local union context, let alone in another context. Furthermore, the holdings of *Berger* and its progeny have been limited to the union context. For instance, in a recent opinion of the D.C. Circuit, that court, commenting on the applicability of its own decision in *Berger* to the corporate liability context, stated: "But the company does not explain why that decision--by its own terms limited to the union context and based upon caselaw and principles unique to that context, *see 843 F.2d at 1427-30*--sensibly could be extended as a requirement for vicarious liability of a company for the actions of its employee-agents. We do not think it can." *Mekuria v. Holiday Universal, Inc.*, 1999 U.S. App. LEXIS 10621, *6 (D.C. Cir. May 5, 1999) [unreported].

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 99-739

IN THE
Supreme Court of the United States

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,
Petitioner,
v.
DAVINE ALEXANDER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The Sixth Circuit decision here imposed both "vicarious" and "direct" 42 U.S.C. § 1981/Title VII of the Civil Rights Act of 1964 liability on the petitioner Laborers' International Union of North America, AFL-CIO (LIUNA) for the discriminatory employment referral practices of a LIUNA affiliated local union (Local 496) in the Local's administration of the Local's hiring hall.

Our *certiorari* petition from that decision was devoted to the following showing: *First*, the decision predicated LIUNA's liability on the International Union's "neglect" to investigate and remedy charges of employment referral discrimination against Local 496 of which LIUNA was on notice, *viz.*, on an "inaction" theory of liability. *See* Pet. at 5-9. *Second*, imposing § 1981/Title VII liability on such an "inaction" theory is contrary to decisions of this Court and of other courts of appeals, reworks the § 1981/Title VII law in a fundamental regard and with profound consequences, and on both grounds warrants this Court's review. *See id.* at 9-25.

Respondents, in tacit admission that given our premise we are right and that the questions we present in the petition are open and important questions going to the essence of the § 1981/Title VII enforcement scheme, spend their energies in attempting to rebut us on the true basis of the decision below.

To be sure, respondents grudgingly acknowledge that LIUNA's *inaction* upon being put on notice of the employment referral discrimination charges against Local 496 was *a* focal point of the Sixth Circuit panel majority opinion, and, indeed, that LIUNA's "acquiesce[nse]" in the Local's discrimination was the "most important[]" fact supporting the Sixth Circuit's direct, "affirmative duty" liability holding. *See* Resp. Br. at 16. But their central premise is that the *certiorari* petition "neglected to men-

tion"/"conveniently ignores" an additional "fact" that entered into the decision below in a "crucial" way: *viz.*, LIUNA's *action* in negotiating a National Maintenance Agreement in March of 1985 which—according to the panel majority and respondents—" 'provided that Local 496 was to act as LIUNA's agent in filling all laborer vacancies at [the] Perry [Nuclear Plant project].' " *Id.* at 2, 11 (quoting Pet. App. 5a); *see also id.* at 13. When that crucial fact is taken into account, respondents assert, it is apparent that the decision below does nothing more than apply "settled law as regards the liability of LIUNA" to the "egregious facts" at hand. *Id.* at 16. And, say respondents, a decision of this nature does not warrant review by this Court. *Id.*[1]

Respondents are, of course, quite correct in stating that a decision of the nature they describe is not worthy of this Court's review. But respondents could not be more wrong in their central premise that the decision below *is* of such a nature.

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[1] Respondents embellish on their central premise by positing the further "fact" that LIUNA had entered into the National Maintenance Agreement with knowledge of an "historical pattern of discrimination" by Local 496 that was attributable "in part" to the Local's adherence to a LIUNA constitutional rule (*i.e.*, the working-at-the-calling-rule). *See* Resp. Br. at i, 7, 13. But the record belies this "factual" assertion.

First, as of the March 1985 date of the National Maintenance Agreement, there had been *no* administrative or judicial finding of discriminatory employment referral practices by Local 496, yet alone a finding of a "pattern" of such discriminatory practices.

Second, respondents' *ipse dixit* to the contrary notwithstanding, the employment referral discrimination of which Local 496 was ultimately found guilty—after many years of litigation—manifestly was *not* attributable in *any* "part" or degree to LIUNA's working-at-the-calling rule. For that rule by its terms has *no* application to local union hiring referrals or to local union hiring halls. *See* Pet. at 4 n.1, 23-24. Indeed, both the panel majority and Judge Batchelder in dissent made the point that the working-at-the-calling rule had no such application, although their use of "waiver" terminology to make the point was imprecise. *See id.*

1. To begin, respondents' statement that " 'the Maintenance Agreement provided that Local 496 was to act as LIUNA's agent in filling all laborer vacancies at Perry,' " Resp. Br. at 2—which is taken verbatim from the Sixth Circuit panel majority opinion, *see* Pet. App. 5a—is not a statement of "fact" at all, but rather a statement of a *legal* conclusion. And, as we demonstrate in section 2 below, the panel majority's conclusion in that regard—which is stated in unreasoned *ipse dixit*, *see* Pet. App. 23a, and from which Judge Batchelder dissented, *see id.* 60a-61a—is contrary to, rather than in accord with, the settled law.

The operative "fact" in this context—which we by no means ignored in our *certiorari* petition, *see* Pet. at 5, is the provision in the Maintenance Agreement stating that "[t]he employer agrees to hire men in any territory where work is being performed or is to be performed in accordance with the hiring procedure existing in the territory where the work is being performed or is performed." Pet. App. 58a.

a. Putting all questions of legal interpretation of this contractual provision to one side, there is one point of fact that is *not subject to any dispute*: the Maintenance Agreement was consummated and became effective in March of 1985. Thus, that Agreement and its hiring procedure provision cannot possibly provide any basis whatsoever for the Sixth Circuit decision's imposition of liability on LIUNA for Local 496's employment referral discrimination *during the pre-March 1985 construction phase of the Perry Nuclear Plant project*, whether on a vicarious liability theory or otherwise.[2]

That being so, it is very much to the point that respondents have not cited *any* "fact" over and above LIUNA

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[2] Approximately 2/3 of the liability imposed on LIUNA by virtue of the decision below is attributable to Local 496's pre-March 1985 construction phase employment referral discrimination.

inaction in investigating and remedying the charges of Local 496 construction phase employment referral discrimination that even arguably supports the imposition of liability on LIUNA for that discrimination. Nor could they. It is undisputed that LIUNA was *not* a party to the Project Labor Agreement (PLA) under which Local 496 had the authority to refer laborers for the construction phase of the Perry project. *See* Pet. App. 2a-3a; *see also id.* 65a (Batchelder, J., dissenting). And, it likewise is undisputed that LIUNA representatives played *no* role in Local 496's decision to make or not to make construction phase employment referrals. *Id.* 5a.

Contrary to respondents' assertion, then, the imposition of liability on LIUNA for Local 496's pre-March 1985 construction phase employment referral discrimination can not be explained away as the mere application of "settled law" resting on LIUNA actions. The "facts" upon which that liability determination must stand or fall consist *entirely* of LIUNA "neglect" to investigate and remedy the charges that Local 496 had engaged in such employment referral discrimination during this phase of the Perry project. There is *no* law, settled or otherwise, that supports such an "inaction" § 1981/Title VII liability theory. *See* Pet. at 13-25.

Very simply stated, then, it is plain beyond peradventure that the Sixth Circuit's construction phase liability determination was predicated entirely on one entity's inaction in investigating and remedying the discriminatory acts of another, legally-separate entity. Respondents' effort to obfuscate that point fails entirely.

b. It is telling as to the certworthiness of the Sixth Circuit's true "inaction" liability theory that when respondents finally seek to defend that theory for what it is all they can do is purport to distinguish "the labor cases cited by LIUNA" that uniformly have rejected such a

theory. *See* Resp. Br. at 15.[3] They are reduced to that desperate strategy by the lack of any case authority supporting that theory.

Respondents' "distinction" is this: "The situation" here is "substantially different," because § 1981/Title VII "are *remedial in nature*," and "[u]nlike the purely economic issues involved in the cases cited by LIUNA, there is a moral dimension to the issues presented here." Resp. Br. at 15-16 (emphasis in original). But that "distinction" can not withstand a moment's scrutiny.

It takes nothing from the high national and social purposes of—and the moral imperatives of—§ 1981/Title VII to recognize that the federal statutes at issue in "the labor cases" respondents would so cavalierly dismiss were designed to achieve high national and social purposes in their own right (*e.g.*, industrial peace with a greater measure of economic justice; and union democracy)—purposes with a strong moral, as well as economic, dimension.

What explains the uniform result in these "labor cases" is the absence of adequate—indeed, the absence of any—support in the applicable statutory text and history for the proposition that Congress intended to achieve the labor statute's purposes and moral imperatives by means of imposing on third parties generally (or international unions in particular) a duty to investigate and remedy allegations of statutory violations by first parties generally (or affiliated local unions in particular).

There is no greater support for that proposition in the language and history of § 1981 and Title VII. *See* Pet. at 14-16. And, it manifestly is not the role of a federal court to rewrite § 1981 and Title VII to satisfy its own particular vision of how best to effectuate the statutes' purposes and moral imperatives. *See id.* at 17-18.

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[3] Those cases include *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212 (1979). *See* Pet. at 18-19.

c. Respondents, moreover, do nothing in their opposition brief to counter our showing as to the profound implications of the Sixth Circuit's "inaction" § 1981/Title VII liability theory. There is no denying that the Sixth Circuit's adoption of that theory *does* "make new law in the international-local union context." *Cf.* Resp. Br. at 17. Unless international unions can reorder in a fundamental way their basic constitutional structures which maintain the internationals and their affiliated local unions as separate legal persons—a reordering that would impose substantial costs on the internationals, on their affiliates and on their members, and would severely strain traditional concepts of union democracy and autonomy—the internationals face endless litigation and massive potential liability under that new law. *See* Pet. at 11-12, 16 & n.5.

Moreover, and notwithstanding respondents' soothing assurances to the contrary, *see* Resp. Br. at 17, there is no legal—and no equitable—basis upon which the Sixth Circuit's § 1981/Title VII "inaction" liability theory could be applied to international unions with legally-separate affiliated locals, but not to corporate parents with legally-separate subsidiaries or national employer associations with legally-separate local chapters. In each of these settings, the relationship between the legally-separate entities is one of contractual affiliation or more strongly yet of outright ownership. And, in each of these settings the claim that the remedial purposes of § 1981/Title VII would be furthered by imposing a third party duty on the former to investigate and remedy charges of discrimination against the latter is equally applicable.

2. Respondents are at least correct in their reading of the Sixth Circuit decision as a decision that treats LIUNA's negotiation of the 1985 National Maintenance Agreement and its hiring procedure provision as "action" that makes its affiliated local unions that administer hiring referral systems the International Union's agents and that

generates International Union § 1981/Title VII liability for a local union's discrimination in making employment referrals. But, contrary to respondents' claim, the Sixth Circuit decision does not rest on "settled law" in this respect. *See* Resp. Br. at 6-9, 12, 16. Rather, this holding of the court below is directly contrary to this Court's international union-local union agency law, and has nothing to do with the court of appeals' decisions cited in the panel majority opinion.

a. The decision below cannot be squared with this Court's decision in *Carbon Fuel.*

At bottom, the Sixth Circuit's maintenance phase liability determination—and respondents' impassioned defense of that determination—rests on the premise that LIUNA assumed an affirmative duty to prevent post-March 1985 maintenance phase employment referral discrimination by Local 496 by entering into a national agreement that "delegated [LIUNA's own] referral authority" to Local 496. *See* Resp. Br. at i, 6-7, 13-14.

But that premise is one that *Carbon Fuel* squarely rejects. The situation in *Carbon Fuel* was not one whit different in this crucial respect: there, the international union signed a national coal industry agreement that prohibited strikes during the term of the agreement but provided no mechanism for preventing such strikes at the local union level, thus effectively "delegating" to each affiliated local union the power of compliance or noncompliance with the contractual no-strike obligation.

In this directly-analogous setting, the *Carbon Fuel* Court declined to impose an affirmative duty on the international union to prevent breaches of the no-strike obligation by its affiliated local unions, and held that the international union could *not* be held liable for such breaches absent evidence that it had "instigated, supported, ratified, or encouraged" those breaches. 444 U.S. at 216-18.

As our *certiorari* petition shows, that holding was in keeping with traditional common-law agency principles as this Court consistently has pronounced and applied those principles in the international union/affiliated local union context. Under these traditional common-law agency principles, an international union is legally responsible for *its own* conduct—*i.e.*, the conduct of *its own* officials and employees—and *not* for the conduct of affiliated local unions in the exercise of their own authority explicitly or implicitly "delegated" to them by the international union. *See* Pet. at 19-25.

b. The "settled law" that the panel majority opinion and respondents invoke has nothing to do with this case or with *Carbon Fuel* and its progeny. That law consists of a line of court of appeals' decisions holding—quite unremarkably—that international unions that negotiate or actively assist in negotiating *substantive provisions* that its affiliated local unions are contractually bound to follow have a § 1981/Tite VII duty to ensure that those *substantive provisions* are non-discriminatory on their face *and* in effect, and a corresponding § 1981/Title VII liability for breaches of that duty. *See* Pet. App. 22a-25a (citing several such decisions); Resp. Br. at 6-9, 12 (citing these and other like decisions).

A leading decision in this line—exemplifying both its limited scope and its quite unremarkable rationale—is *Sagers v. Yellow Freight Systems, Inc.*, 529 F.2d 721 (5th Cir. 1976), relied on heavily in the panel majority opinion and by respondents. In *Sagers*, the Teamsters International Union and a Teamsters intermediate body, the Southern Conference, were parties to a series of national and regional trucking agreements containing *substantive "dual seniority" provisions* that were found to have a discriminatory effect as implemented by, *inter alia*, affiliated local unions in the Houston, Texas area that were bound by the national and regional agreements. The

Teamsters International Union and the Southern Conference sought to defend a § 1981/Title VII suit against them on the grounds that the dual seniority provisions *that the Teamsters International and the Conference themselves had negotiated* "are not on their face discriminatory and [that] they had no notice that there was discrimination at the Houston terminal." 529 F.2d at 737 n.32. The Fifth Circuit was singularly unimpressed with that argument under these circumstances:

> These union organizations have a duty under § 1981 to inquire into the effect of the contract provisions when it is reasonable to assume, as it is here, that they might lead to discrimination. . . . This duty includes the responsibility to determine if the agreements they help negotiate lock in any such past discrimination. [529 F.2d at 737 n.32 (internal quotations omitted).]

Here, in sharp contrast, the National Maintenance Agreement negotiated by LIUNA in March of 1985 did *not* contain any *substantive employment referral provisions* that Local 496 was contractually bound to follow. To the contrary, as Judge Batchelder pointed out in her dissenting opinion below, LIUNA "merely secur[ed] in the National Maintenance Agreement a promise that the [maintenance] contractors will follow Local 496's hiring procedures, *whatever they may be*." Pet. App. 61a (Batchelder, J., dissenting) (emphasis added). That being so, *Sagers* and like decisions cited in the panel majority opinion and by respondents are not on point and do not support the imposition of liability on LIUNA for Local 496's post-March 1985 maintenance phase employment referral discrimination. As Judge Batchelder put it, "[i]n the cases cited . . . the provisions in question were themselves discriminatory and were explicitly negotiated by the international." *Id.* 61a-62a; *see also id.* 62a-63a.

c. The Sixth Circuit's reliance on the National Maintenance Agreement in holding LIUNA directly and vicari-

ously liable here, in addition to being in direct conflict with *Carbon Fuel*, has profound consequences for the great many international unions that negotiate national or regional agreements on behalf of their affiliated local unions in a great many industries in this country.

International unions negotiate such national and regional agreements in a wide variety of different settings, including the construction industry setting in which this case arises, the trucking industry setting in which the Fifth Circuit decision in *Sagers* arose, and the coal industry setting in which this Court's decision in *Carbon Fuel* arose. It is one thing to hold, as the *Sagers* line of decisions does, that an international union is legally responsible for the discriminatory effect of substantive contract provisions that affiliated local unions are bound to follow by virtue of their inclusion in a national or regional agreement negotiated by the international union itself. But it is quite another thing to hold, as the Sixth Circuit did here, that an international union is legally responsible for its affiliated local unions' discrimination in the local's autonomous exercise of its authority under such an agreement.

The practical consequence of such a holding is to force international unions to refrain from negotiating such agreements and to reserve all such contractual authority for itself; otherwise, the internationals will be liable for any and all transgressions by their affiliated local unions in the exercise of the locals' "delegated" authority. It is no exaggeration to say that this would work a radical transformation in the traditional relations between international unions and their affiliated local unions in numerous industries within this country, as well as the normal processes of collective bargaining in those industries.

CONCLUSION

For the foregoing reasons, and those stated in the *certiorari* petition, the petition should be granted.

Respectfully submitted,

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